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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 253.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY AND THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

MARGARET L. HICKEY AND JOHN P. HICKEY, HER HUSBAND.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 4, 1895.

(15,857.)

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In the Court of Appeals of the District of Columbia.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY and The Baltimore and Potomac Railroad Company, Appellants,
vs.
MARGARET L. HICKEY and JOHN P. HICKEY.
No. 364.

a In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband,
vs.
THE WASHINGTON & GEORGETOWN RAILROAD Company and The Baltimore & Potomac Railroad Company.
At Law. No. 30767.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration.*

Filed July 2, 1890.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband,
vs.
THE WASHINGTON AND GEORGETOWN RAILroad Company and The Baltimore and Potomac Railroad Company.
At Law. No. 30767.

Declaration.

The plaintiffs, Margaret L. Hickey and John P. Hickey, her husband, sue the defendants, The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company, the former a corporation organized under the laws of the United States in force in the District of Columbia and the latter a corporation organized under the laws of the State of Maryland and having

an office and agents and doing business in the District of Columbia, for that heretofore, to wit, on the 12th day of August, A. D. 1889, and prior thereto, the defendant The Washington and Georgetown Railroad Company was a common carrier of passengers for hire along certain lines of street railway owned and operated by it over certain streets in the city of Washington, D. C., amongst others on Seventh street west from
2 its intersection with Pennsylvania avenue and beyond to its intersection with Maryland avenue, in said city, and the said Baltimore and Potomac Railroad Company was a common carrier of passengers and freight for hire over certain lines of railroad tracks owned and operated by it and over certain streets in said city of Washington, amongst others over Maryland avenue from the structure known as the Long bridge to and beyond the intersection of said avenue with said Seventh street west and where the tracks of said steam railroad cross the tracks of the Washington and Georgetown Railroad Company, and the plaintiffs aver that on said day the female plaintiff boarded one of the cars of the defendant The Washington and Georgetown Railroad Company at the junction of Seventh street west and Pennsylvania avenue and paid the fare entitling her to passage thereon and said car proceeded southerly along said Seventh street until it approached the point before mentioned where the tracks of the said steam railroad crosses Seventh street, and as the said street car approached said crossing going south a train of cars operated and managed by the servants of the defendant The Baltimore and Potomac Railroad Company and propelled by a steam engine also approached said crossing from the west, going at a rapid rate of speed, and the plaintiffs aver that it was the duty of the driver of the said street car and of the engineer and other employees of the defendant The Baltimore and Potomac Railroad Company to so conduct and manage the said street car and the said train of steam cars as to avoid danger to the passengers in said street car, but the plaintiffs aver that, un-
3 mindful of their duty in the premises, the said defendants and each of them and their and each of their servants and employees in charge of said car and train conducted themselves so carelessly and negligently that as said street car approached said crossing the gate-keeper who was operating the gates or guards at said crossing which were erected for the purpose of preventing damage to vehicles and foot passengers negligently allowed the driver of said street car to drive the same partly beneath the said gates and partly over and across the tracks of the said The Baltimore and Potomac Railroad Company; and plaintiffs further aver that the driver of said street car so negligently and carelessly conducted and managed his said car that before said street car could entirely cross said tracks the said gates were suddenly lowered upon said street car, said train of steam cars approaching rapidly all the while, and the passengers in said street car, seeing the danger of impending collision and endeavoring to save themselves from the consequences thereof, rushed from said street car to a place of safety upon the ground, and in the confusion thereby created the female

plaintiff, who was conducting herself in a careful and prudent manner, was pushed and shoved from her seat in said car and thrown violently to the ground, and in falling her foot and leg were caught beneath the wheels of said car, and said wheels passed over the same, crushing and breaking the bones of the ankle and leg and almost severing the foot from the leg, and she further sustained severe cuts and bruises in various parts of her limbs and body and suffered severe and permanent internal injuries, whereby and
4 in consequence of which she has suffered and still suffers great pain and anguish of body and mind and has been permanently injured in her bodily health and her power of locomotion has been permanently impaired and she has been rendered a cripple and chronic invalid, unable to perform manual labor or undergo any physical exertion.

And the plaintiffs aver that the injuries occasioned to the female plaintiff were caused by the gross carelessness and neglect of said defendants and each of them, their and each of their servants and employees, and by reason of the fact that the track upon which the said defendant, The Baltimore and Potomac Railroad Company, was running its said train was laid and maintained without any authority of law.

Wherefore the plaintiffs bring suit and claim the sum of $30,000.00 besides costs.

G. E. HAMILTON,
M. J. COLBERT,
Attorneys for Plaintiffs.

The defendants are to plead hereto on or before the first day of the first special term occurring twenty days after service hereof; otherwise judgment.

G. E. HAMILTON,
M. J. COLBERT,
Attorneys for Plaintiffs.

5 *Summons.*

Issued July 2, 1890.

In the Supreme Court of the District of Columbia, the 2 Day of July, 1890.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband, Plaintiffs,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD Company and The Baltimore and Potomac Railroad Company, Defendants.
} At Law. No. 30767.

The President of the United States to the defendants, Greeting:

You are hereby commanded to appear in this court on the first day of its first special term, occurring 20 days after service of this

writ on you, to answer the plaintiffs' suit and show why *he* should not have judgment against you for the cause of action stated in *his* declaration.

Witness E. F. Bingham, chief justice.

[SEAL.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

HAMILTON & COLBERT, *Attorney-*.

6 NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

Marshal's Return.

Served copies of the declaration, notice to plead, and this summons on the defendants, The Washington & Georgetown Railroad Company, by service on Henry Hurt, president said company, July 2, 1890, and The Baltimore and Potomac Railroad Company, by service on Dan'l P. McKeever, agent said Co., July 2, 1890.

D. M. RANSDELL, *Marshal.*

7 *Plea of the Washington and Georgetown Railroad Co.*

Filed September 8, 1890.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband, *vs.* THE WASHINGTON AND GEORGETOWN RAILroad Company and The Baltimore and Potomac Railroad Company.	At Law.	No. 30767.

Plea.

And now comes the said defendant, The Washington and Georgetown Railroad Company, and for plea says that it is not guilty in manner and form as said plaintiffs in and by their said declaration have alleged.

ENOCH TOTTEN,
Attorney for Defendant.

8 *Plea of the Baltimore and Potomac Railroad Co.*

Filed September 8, 1890.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD Company and The Baltimore and Potomac Railroad Company. } At Law. No. 30767.

Plea.

And now comes the said defendant, The Baltimore and Potomac Railroad Company, and for plea says that it is not guilty in manner and form as said plaintiffs in and by their said declaration have alleged.

ENOCH TOTTEN,
Attorney for Defendant.

9 *Joinder of Issue, &c.*

Filed September 15, 1890.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband,
vs.
THE WASH'N & GEORGETOWN R. R. Co. and THE BALTO. & POTOMAC R. R. Co. } At Law. No. 30767.

Joinder of issue.

The plaintiffs join issue on the defendants' pleas filed herein.

G. E. HAMILTON,
M. J. COLBERT,
Attorneys for Plaintiffs.

Attorneys for plaintiffs, G. E. Hamilton, M. J. Colbert.
Attorneys for defendants, Enoch Totten.
Last pleading filed September 15th, 1890.
For the clerk.

10 Proceedings before the supreme court of the District of Columbia, holding a circuit court, division No. 2, and special term in and for said District, pursuant to an order therefore made in general term December 22d, 1893, said special term commencing the first Tuesday, it being the 3d day, of April, A. D. 1894.

TUESDAY, *April 3rd, A. D.* 1894.

By order of Hon. Walter S. Cox, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

FRIDAY, *April 20th, A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * * *

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband, Plaintiffs,
vs.
THE WASHINGTON AND GEORGETOWN RAILroad Company and The Baltimore and Potomac Railroad Company, Defendants. } At Law. No. 30767.

Now comes here as well the plaintiffs, by their attorneys, Messrs. Hamilton and Colbert, as the defendants, by their attorneys, Messrs. Davidge and Maddox, and a jury of good and lawful men of this District, to wit, Charles C. Connor, A. O. Brady, Paul
11 Keiser, Jr., James B. Wright, William E. Turton, Sterling J. Gardiner, James Plant, John F. Nelligan, Frederick A. Lehman, Joseph A. O'Hare, George W. Sanford, and Ernest Perry, who, being duly sworn to try the issues above joined, after a partial hearing of the case are respited until the meeting of the court tomorrow morning.

* * * * * * *

MONDAY, *April* 23, *A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband, Plaintiffs,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMpany and The Baltimore and Potomac Railroad Company, Defendants. } At Law. No. 30767, Cal. 233.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited on Friday last, who, after a further hearing of the case, are again respited until the meeting of the court tomorrow morning.

TUESDAY, *April 24th, A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

12 MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband, Plaintiffs,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD Company and The Baltimore and Potomac Railroad Company, Defendants. } At Law. No. 30767.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court tomorrow morning.

WEDNESDAY, *April 25th, A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband, Plaintiffs,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD Company and The Baltimore and Potomac Railroad Company, Defendants. } At Law. No. 30767, Cal. 233.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court tomorrow morning.

13 THURSDAY, *April 26th, A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband, Plaintiffs,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD Company and The Baltimore and Potomac Railroad Company, Defendants. } At Law. No. 30767.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court tomorrow morning.

* * * * * * *

FRIDAY, *April 27th, A. D.* 1894.

Session resumed pursuant to adjournment, Bradley, justice, presiding.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband, Plaintiffs,
vs.
THE WASHINGTON AND GEORGETOWN RAILroad Company and The Baltimore and Potomac Railroad Company, Defendants.
At Law. No. 30767, Cal. 233.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who,
14 after a further hearing of the case, are again respited until the meeting of the court on Monday morning next.

* * * * * * *

MONDAY, *April 30th, A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband, Plaintiffs,
vs.
THE WASHINGTON AND GEORGETOWN RAILroad Company and The Baltimore and Potomac Railroad Company, Defendants.
At Law. No. 30767, Cal. 233.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited on Friday last, who, after the case is given them in charge, retire to their room to consider of their verdict, with permission, if they agree during the adjournment of the court after reducing their verdict to writing, signing, sealing up, and delivering the same to their foreman, to separate until the meeting of the court tomorrow morning.

TUESDAY, *May 1st, A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

15 MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband, Plaintiffs,
vs.
THE WASHINGTON AND GEORGETOWN RAILroad Company and The Baltimore & Potomac Railroad Company, Defendants.
At Law. No. 30767, Cal. 233.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury come into court and on their oath say they find said issues joined in favor of the plaintiffs and assess their damages by reason of the premises at the sum of twelve thousand dollars.

Order for Entering Appearance of Samuel Maddox for B. & P. R. R.

Filed May 2, 1894.

In the Supreme Court of the District of Columbia, the 2nd Day of May, 1894.

MARGARET L. HICKEY *et al.*
vs.
BALTO. & POTOMAC R. R. CO. *et al.* } At Law. No. 30767.

The clerk of said court will please enter my appearance for defendant The Baltimore and Potomac Railroad Company.

SAMUEL MADDOX.

16 *Motion for New Trial.*

Filed May 2, 1894.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY and Another
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY *et al.* } At Law. No. 30767.

And now comes The Baltimore & Potomac Railroad Company, one of the defendants in the above-entitled cause, and moves the court to set aside the verdict hereinbefore rendered against said defendant in this cause and to grant a new trial therein, and for reasons therefor assigns the following, to wit:

1. Because the verdict is contrary to the evidence.
2. Because the evidence is insufficient in law to sustain said verdict.
3. Because the verdict is against the weight of the evidence.
4. Because the damages awarded by the jury are excessive.
5. For errors of law founded on exceptions reserved during the trial and noted on the minutes of the justice who tried the cause.
6. For errors of law in granting the written instructions
17 prayed by plaintiffs' counsel and refusing instructions prayed by counsel for said defendant.
7. For errors of law in granting written instructions prayed by counsel for The Washington & Georgetown Railway Company, one of the defendants in said cause.
8. For errors of law in the charge of the court to the jury, excepted to at the time and noted on the minutes of the court.

SAMUEL MADDOX.
Attorney for Baltimore & Potomac Railroad Company.

Motion in Arrest of Judgment.

Filed May 5, 1894.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY *et al.*
vs.
THE BALTIMORE & POTOMAC RAILROAD COMPANY *et al.* } At Law. No. 30767.

And now comes The Baltimore & Potomac Railroad Company, one of the defendants in the above-entitled cause, and moves the court to arrest judgment herein against the said defendant company, and for reasons therefor assigns the following:

1. The declaration does not aver and there is no evidence tending to prove that the gate-keeper against whom negligence is
18 charged was a servant of the Baltimore & Potomac Railroad Company.

2. The declaration does not aver that said defendant, The Baltimore & Potomac Railroad Company, was bound by any duty in connection with the gates erected at the intersection of 7th street and Maryland avenue southwest.

3. There is no evidence in the record and none was adduced before the jury tending to prove negligence on the part of any servant, agent, or employé of said defendant company having charge of the train of steam cars approaching 7th street on its tracks at the time of the accident to the female plaintiff.

SAM'L MADDOX,
Attorney for Baltimore & Potomac Railroad Company.

SATURDAY, *May 5th, A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

MARGARET L. HICKEY and JOHN P. HICKEY, Plaintiffs,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD Company and The Baltimore and Potomac Railroad Company, Defendants. } At Law. No. 30767.

And now comes the defendant The Washington and Georgetown Railroad Company and moves the court to set aside the
19 verdict and grant a new trial in the above-entitled cause—

1. Because the verdict was against the evidence.
2. Because the verdict was against the weight of the evidence.
3. Because the evidence was insufficient to support the verdict.
4. Because the verdict was against the instructions of the court.
5. Because the damages assessed by the jury are excessive.

6. Because of errors of law in the rulings of the presiding justice during the trial.

7. Because of errors of law in the instructions to the jury.

8. Because the verdict was not the result of deliberation on the part of the jury based upon the evidence, but in whole or in part of passion and prejudice.

And now comes The Baltimore and Potomac Railroad Company, one of the defendants in the above-entitled cause, and moves the court to arrest judgment herein against the said defendant company, and for reasons therefor assigns the following:

1. The declaration does not aver and there is no evidence tending to prove that the gate-keeper against whom negligence is charged was a servant of the Baltimore and Potomac Railroad Company.

2. The declaration does not aver that defendant The Baltimore and Potomac Railroad Company was bound by any duty in connection with the gates erected at the intersection of 7th street and Maryland avenue southwest.

3. There is no evidence in the record and none was adduced
20 before the jury tending to prove negligence on the part of any servant, agent, or employee of said defendant company having charge of the train of steam cars approaching 7th street on its tracks at the time of the accident to the female plaintiff.

SATURDAY, *June 2nd, A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham, justice presiding.

MARGARET L. HICKEY and JOHN P. HICKEY, her Husband, Plaintiffs,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD Company and The Baltimore and Potomac Railroad Company, Defendants. } At Law. No. 30767.

Upon hearing the defendants' motions for a new trial, it is considered that said motions be, and the same are hereby, granted, unless the plaintiffs remit from the verdict within five days the sum of six thousand dollars.

21 *Remittitur.*

Filed June 5, 1894.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY *et al.*
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY *et al.* } At Law. No. 30767.

The clerk will please enter a remittitur of six thousand dollars ($6,000.00) on the verdict rendered in the above-entitled cause.

HAMILTON & COLBERT,
Attorneys for Plaintiffs.

Motion for Judgment on Verdict.

Filed June 6, 1894.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY *et al.*
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY *et al.* } At law. No. 30767.

Now come the plaintiffs and move the court for judgment
22 on the verdict in the above-entitled cause.

HAMILTON & COLBERT,
Attorneys for the Plaintiff.

SATURDAY, *June 9th, A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband, Plaintiffs,
vs.
THE WASHINGTON AND GEORGETOWN RAILroad Company and The Baltimore and Potomac Railroad Company, Defendants. } At Law. No. 30767.

Upon hearing the defendants' motion in arrest of judgment it is considered that said motion be, and the same is hereby, overruled; and upon hearing the plaintiffs' motion for judgment on the verdict rendered May 1st, 1894, less the remittitur filed in the above-entitled cause on June 5th, 1894, it is considered that said motion be, and the same is hereby, granted. Therefore it is consid-
23 ered that the plaintiff- recover against said defendants six thousand dollars ($6,000), being the money payable by them to the plaintiffs by reason of the premises, and the costs of suit, to be taxed by the clerk, and have execution thereof. Appeal by defendants.

Appeal of the W. & G. R. R. Co.

Filed June 9, 1894.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY *et vir.*
vs.
THE WASHINGTON & GEORGETOWN RAILROAD Co. *et al.* } At Law. No. 30767.

And now comes the defendant The Washington and Georgetown Railroad Company, by its attorney, and appeals from the judgment

herein entered against it, said defendant, and from the order overruling its, said defendant's, motion for a new trial.

ENOCH TOTTEN,
Att'y for W. & G. R. R. Co.

24 *Appeal of the B. & P. R. R. Co.*

Filed June 9, 1894.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY *et vir.*
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY *et al.* } At Law. No. 30767.

And now comes the defendant The Baltimore and Potomac Railroad Company, by its attorney, and appeals from the judgment herein entered against it, said defendant, and from the orders overruling its, said defendant's, motions for a new trial and in arrest of judgment.

SAM'L MADDOX,
Attorney for the B. & P. R. R. Co.

Order for Citation.

Filed June 13, 1894.

In the Supreme Court of the District of Columbia, the 13th Day of June, 1894.

MARGARET L. HICKEY *et al.*
vs.
THE BALTO. & POTOMAC R. R. CO. *et al.* } At Law. No. 30767.

The clerk of said court will please issue citation on appeal taken in this case.

SAM'L MADDOX,
Attorney for B. & P. R. R. Co.

ENOCH TOTTEN,
Att'y for W. & G. R. R. Co.

25 In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband,
vs.
THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY and The Baltimore and Potomac Railroad Company. } At Law. No. 30767.

The President of the United States to Margaret L. Hickey and John P. Hickey, her husband, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia on the 3 day of September,

A. D. 1894, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia on the 9 day of June, 1894, wherein The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company are appellants and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 13 day of June, in the year of our Lord one thousand eight hundred and ninety-four.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 13 day of June, 1894.

HAMILTON & COLBERT,
Attorney-for Appellee-.

[Endorsed:] No. 30767. Law. Margaret L. Hickey *et vir. vs.* The Washington and Georgetown Railroad Company *et al.* Citation. Issued June 13, 1894. Served cop- of within citation on ——— ———, marshal. Maddon and Totten, attorneys for appellants.

26 *Bond for Appeal.*

Filed June 18, 1894.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband, *vs.* WASHINGTON & GEORGETOWN RAILROAD CO. and BALTIMORE & POTOMAC RAILROAD CO.	At Law.	No. 30767.

Know all men by these presents that the Washington and Georgetown Railroad Company, as principal, and George T. Dunlop, as surety, are held and firmly bound unto the above-named Margaret L. Hickey and John P. Hickey, her husband, in the full sum of twelve thousand (12,00–.00) dollars, to be paid to the said Margaret L. Hickey and John P. Hickey, her husband, their executors or administrators or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 14th day of June, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas the above-named Washington and Georgetown Railroad Company has prosecuted an appeal to the Court of Appeals of the District of Columbia to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

27 Now, therefore, the condition of this obligation is such that if the above-named Washington and Georgetown Railroad Company shall prosecute its said appeal to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

WASHINGTON AND GEORGETOWN R. R. CO.,
By GEORGE T. DUNLOP, *Vice-p.* [SEAL.]
GEORGE T. DUNLOP. [SEAL.]

Sealed and delivered in presence of—
——— ———.

This bond is satisfactory.
HAMILTON & COLBERT,
Att'ys for Plaintiffs.

Approved the 18th day of June, 1894.
E. F. BINGHAM,
Chief Justice S. C. D. C.

28 *Bond for Appeal.*

Filed June 18, 1894.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband,
vs.
WASHINGTON AND GEORGETOWN RAILROAD Co. and Baltimore and Potomac Railroad Co.
No. 30767. At Law.

Know all men by these presents that the Baltimore and Potomac Railroad Company, as principal, and John Cassels, as surety, are held and firmly bound unto the above-named Margaret L. Hickey and John P. Hickey, her husband, in the full sum of twelve thousand (12,000.00) dollars, to be paid to the said Margaret L. Hickey and John P. Hickey, her husband, their executors or administrators or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 16 day of June, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas the above-named defendant, The Baltimore and Potomac Railroad Company, has prosecuted an appeal to the
29 Court of Appeals of the District of Columbia to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is such that if the above-named Baltimore and Potomac Railroad Company shall prosecute its said appeal to effect and answer all damages and costs

if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY,
By E. TOTTEN,
Its Attorney-in-fact. [SEAL.]
JOHN CASSELS. [SEAL.]

Sealed and delivered in presence of—

This bond is satisfactory.
HAMILTON & COLBERT,
Att'ys for Plaintiffs.

Approved the 18th day of June, 1894.
E. F. BINGHAM,
Chief Justice S. C. D. C.

30 *Bill of Exceptions.*

Filed July 7, 1894.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY and JOHN P. HICKEY, Plaintiffs,
vs.
THE WASHINGTON & GEORGETOWN RAILROAD Company and The Baltimore & Potomac Railroad Company, Defendants.
At Law. No. 30767.

Defendants' bill of exceptions.

Be it remembered that at the trial of this cause the plaintiffs, to maintain the issues upon their part joined, offered and gave the following testimony:

By the plaintiff, MARGARET L. HICKEY, who testified on direct examination as follows:

My name is Margaret L. Hickey. I am the plaintiff in this cause, and my husband's name is John P. Hickey. I was married on the 14th day of February, 1888. The accident to my foot happened on the 12th day of August, 1889. On that morning I left my
31 house about eight o'clock to see my physician, Doctor Murphy. When I started to go home I boarded a Pennsylvania avenue street car, which went along Pennsylvania avenue to Seventh street, where we got a transfer to a car going south. My husband left me there to go to his place of business, and I returned home, on D street between Second and Third southwest. The car, which was a summer car, was very much crowded. I sat down on

the outside of the third seat from the front of the car, in a very small space. We went along all right until we got to Seventh and Maryland avenue. The steam car was coming and the people got very much excited and jumped up, and in the confusion I was pushed off the car. The steam car appeared to be about 40 or 60 feet away. I remember rolling off the track, and then a white gentleman pulled me by the arm underneath the gate. With that the steam car passed, and I could feel the effects of it and feel it to this day. As we approached Seventh street they had lowered the gates. The people on the car appeared to be going on an excursion, and, if I judge right, they were in very much of a hurry. They kept saying, "Hurry up, driver;" so the gates were partly raised again and he attempted to get by, and that was the time I was thrown off the car, pushed off the car. When the gates were lowered I think the street car stopped. It tried to get through afterwards, which I heard it succeeded in doing. In the meantime I was pushed off the car. At this time the steam car was about 40 or 60 feet to the west, going very rapidly.

32 After the gates had been lowered and while the street car attempted to get under it I think they were lowered a second time. Everything was such excited just at that time. I do not know whether that was the time I was pushed off or not. I remember being pushed off the track and having no other way of moving than to roll of the track to keep from being killed. I was pushed off of the car. After I rolled off the steam-railway track a white gentleman pulled me from under the gate, and then I attempted to stand. He said, "You can't stand. Just place one arm around my neck and one arm around the neck of the other gentleman and we will have to carry you." I then made the remark, "Oh, sir, my umbrella and parasol." He said, "They will be attended to." Then they brought me to a drug store, which, I think, was closed, and afterwards to Mr. Baum's wood & coal office, on Seventh street, where I remained until my husband was sent for. Then I was placed on a stretcher and carried home in the police ambulance; this was three-quarters of an hour after the accident. While in the wood and coal office I remember they placed a chair and a pillow, lifting my limbs upon them and putting them on that. Then they brought some medicine, which I refused to take. Outside of that I do not think there was anything done, any more than to make me comfortable while I remained there. When I was taken home Doctor Hazen and Surgeon General Hamilton came and fixed my foot. I was in bed eight months, four months of which I was on my back and could not turn one side or the other. My foot was suspended in a sling.

33 After I got out of bed I was confined on crutches, without going down-stairs at all for two months. After I got down-stairs I was in the house six or seven months longer. After I discarded my crutches I was obliged to use a cane for about a year; in fact, I ought to do that now. I cannot now walk on my heel. I walk entirely on the ball of my foot. My shoe has to be specially made—built up with leather. It is the right foot. While I was

confined to bed the pain and suffering was just simply awful; at times it was dreadful. I did not close my eyes night or day for six weeks. The pain was so great that the things they got to put me to sleep had no effect at all. My foot was crushed. The hind wheel of the steam car passed over it. It was crushed and broken in two places and now it is very much swollen in size; it is about four or five inches larger in thickness that the other ankle and pains me dreadfully at times. Sometimes I cannot think of going out of the house, the pain is so great. Whenever we are going to have a change of weather or anything of that sort it hurts awfully—dreadfully. I can walk about a square; that is just about as far as I can walk without taking a car. In addition to the injury to my ankle, I am extremely nervous, so that I am afraid of a whistle blowing or the least little noise or anything of that sort. I scarcely ever sleep through the night on account of nervousness and a feeling of that sort. You never could get me on the railroad—the steam cars. I don't think they will ever get me on them again, and, as to the street cars, I never go alone on them. When they
34 pulled me under the gates my arm was very much hurt, and my side. I also received internal injuries, which I feel very pained about. It is at different periods that I suffer dreadfully, of course. I am not able to attend to my household duties; I scarcely ever go into the basement; I am not able to go up and down the basement steps; my foot won't stand walking up and down stairs; it gets very tired and the pain is very great, and I do not feel as if I could possibly do it. It is more painful to go up and down stairs than walking otherwise. I do not know whether the right limb is shorter than the other; I cannot walk without limping. It appears to me that it was a man who pushed me off the car. Right next to me there was a great big woman, an immense woman; I noticed that when I first got on the car. She was next to me or second next to me, I just don't know, on the same side.

And thereupon the witness further testified on cross-examination, in response to questions propounded to her by the counsel for the Washington & Georgetown Railroad Company, as follows:

I got on the car at Seventh street, after it was very much crowded, and several of the passengers got on after I did. I sat upon the third or fourth seat from the front, on the east side of the car, going down. I was on my way home and intended to get off at Seventh and D streets southwest. It seems to me there were 35 or 40
35 people on the car, but about that I cannot be certain. They had picnic baskets and everything of that sort—children sitting on their laps. I judge they were going on an excursion. I sat right on the end of the seat; I cannot say whether a gentleman or a lady sat next to me. It appears to me it was a lady, a very stout lady, and then it appears to me again that it was a gentleman. There was an upright pillar or stanchion at the end of the bench I sat on. As we approached Maryland avenue the steam car was coming, and it was a very short distance above the box at that time. The steam — was going and they all jumped up and hollered. I

saw the steam car; it was going at full speed—20, 30, or 40 miles an hour; though I know very little about the speed of trains. This was at Maryland avenue and Seventh street. The engine was coming east. According to my judgment it was 40 or 60 feet away. The gate had been lowered, but it was raised; I remember that distinctly and well. They had the gates down; the gateman raised them to let the car go through, and the car got through, as I understood afterwards. The passengers were eager to get to the boat and the gate-keeper raised the gate and the car got through. It was a very narrow, little place. There is just one track, and of course I would have to be in the center of the track, because I remember rolling off the track onto this side, and then a man pulled me off under the gates. I judge I fell on the track, and I remember distinctly that I was pushed between the two gates; whether by a lady or gentleman
I do not know truthfully which; by this I mean in the scuffle;
36 I do not know what you would call it; in the commotion
and in the excitement I was pushed off the car where I was sitting right on the edge. I am most certain I was pushed off the car. I was pushed off in the center, between the two gates, and in order to save myself from being killed I rolled off the track; then this man pulled me from under the gate, which was then down. The cars were then going past and I could then feel the feeling of it going through my hair; it made it stand out stiff; I cannot talk of it now without the feeling. When I say I was pulled from under the gate I mean I was pushed off the car into what must have been the center of the track. I then remember rolling off the track to save myself from being killed. I knew there were no more tracks and if I was off of this one I would at least be saved from being killed. I was then pulled from under the gate this way; I mean the north gate; a man pulled me this way from under the gate. The steam-engine passed right after I rolled myself off. In the meantime I was jerked out under the gate; my arm was very sore from the jerk I had to get. The time was so very short after that before the steam train passed that I really cannot say how long it was; it might have been a second or half a second; it was almost instantaneously. I feel the motion of the steam-engine in my hair
yet and as distinctly as I did then. I was picked up north
37 of the north gate. After that the gentleman took hold of
me and carried me away. Then I said, "Gentlemen, my umbrella and parasol." The remark that one of them made, to think that I could think of that, of course I cannot repeat; it is a fact, though, nevertheless. My umbrella and parasol were left at the house afterwards. After I saw the steam-engine 40 or 60 feet away I did not see it again down to the time of the accident. In all that commotion and excitement I certainly could not see the steam car, with all the people jumping and hollering. I did see it, though, as near as I can tell, 40 or 60 feet away. I was not very much excited by this accident. No one saw it who did not remark about the composure I exhibited at the time; I was perfectly composed *an* and entirely in command of my faculties. I distinctly remembe- everything that happened during that hour. I am posi-

tive that I did not jump off of that car and that I was pushed off; it was either a man or a woman that pushed me off. I do not know who the person was sitting next to me. I was sitting at the time at the end of the seat. Every seat at the time was occupied and some were standing at the back of the car. I heard the doctor say that the wheel of the car passed over my foot, and it must have been so, for my foot was almost entirely severed; my heel was twisted where my toes ought to be, and I never could look at my foot from the time it was hurt until I could put on hose. I am certain the east hind wheel of the street car ran over my foot; it was too short
38 and too dreadful to tell whether I felt the pain of the car wheel passing over my foot. I recollect the sensation of the wheel passing over my ankle. It was just awful. This was before the steam-car passed. My heel does not come within half an inch down into my shoe. Surgeon General Hamilton fixed my limb, and came from nine to ten weeks afterwards every morning at nine o'clock; Doctor Hazen also. My side was bruised where I was pushed off and my elbow was skinned, the nurse told me afterwards. The left side was bruised and I was rolled over on my right side. The bruise was a matter of very little importance compared with what I was suffering from my foot, but it was a matter of importance, for it hurt me, and this arm hurts me yet. There are times when I have a stiff pain, and I have to let my left arm drop sometimes. That was hurt, I suppose, by the fall and by being jerked so quickly and so roughly from under the gates.

And thereupon the witness further testified upon cross-examination, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

On returning home I was accustomed to get off at Seventh and D streets. It would be nearer to get off at Virginia avenue, but I got off at Seventh and D because it was a sort of a habit, I suppose, more than anything else. I seldom went on that line of cars to get home. I would generally go down D street to the Jefferson School building and cross over the railroad tracks. I used to make a habit of going that way. I was not thinking about railroad tracks.
39 I had passed them often. As little as I had gone that way, I was accustomed to seeing engines approach from one direction to another. I did not see them a great many times, because I very seldom went that way. The Ninth street cars took me nearer home. I had never been to see Dr. Murphy before. I lived on D street a great many years. I think I had been sitting down when I was shoved off. I do not know whether I moved, or something of that sort. I think I was sitting down. The lady sitting next to me had been sitting down before the commotion, but I think they all jumped up and hollered. I do not think I jumped then; there was no jumping about it. I did not jump at all. I have become awfully afraid, and said, "Oh, my!" I was pushed right off the car. I did not rise to get off. I was sitting perfectly still, waiting to get down to Seventh and D streets. There were people standing on the front platform and on the side—on the west side—of the car,

As near as I can judge, I was sitting on the third or fourth seat from the front, in the corner seat—the east corner seat. The car had not stopped since it left Maine avenue. The gates were being lowered when the street car approached the steam-car track; then they were raised. The stree- car went ahead after the confusion had happened. The gates came down in front of the horses or on their manes. I cannot say just how it looked in all the excitement and just how it happened. The street car stopped as the gates were lowered, and then the gates were slowly being raised and they went by. It was while they were going by
40 when I was pushed off. I did not hear or know of anybody else being pushed off but me. After I was pushed from under the gate I tried to stand, and a man came to help me, a white man, who pulled me from under the gates. He was not a passenger on the car. I did not know him at the time, but have learned since his name was McCoy. A colored man also came to my assistance, whose name I do not know. They carried me in an upright position. I did not attempt to hop. In the way of parcels I had an umbrella or parasol and pocket-book. I dropped them both. After I was pulled from under the gates I remarked to the gentleman, Oh, sir; my pocket-book and my umbrella. I called it an umbrella. I did not have an umbrella and a parasol; I just had an umbrella. I used a parasol for both purposes. I do not remember that I stood up for the purpose of getting off the car when I was pushed off or whether I stood up in an attempt to get off or not. I remember that I was very much alarmed. I said, "Oh, my!"—I remember making that remark—and then I was pushed right along. I might have stood up in the confusion and excitement, like every one else. I know that there were parties who stood up and almost jumped from one seat to the other in front and behind me. I might have stood up. No other lady except myself got off the car. I did not hear that any other was oushed off. I do not remember
41 whether there were any men standing on the east side of the car. I know there were men standing on the other side and on the front and back of the car. I saw the engine just before I was pushed off.

On redirect examination the witness further testified as follows:

I think the street car continued south after it crossed the railroad track. I do not think it stopped at all. My health was all right before the accident. The gates were lowered and then raised to let the car pass and then they were lowered again. That was when I was pulled from under the gates. It was my purpose to get off at Seventh and D streets, which is further south than the place where I was pushed off.

On recross-examination, in response to questions propounded by the counsel for the Washington and Georgetown Railroad Company, the witness further testifies as follows:

After I was thrown off I do not know what happened to the street car, but it does appear to me that it did not stop at all. As I have

already said, I am uncertain about it. I was pushed off the east side of the car and my face must have been north.

On further recross-examination the witness testified, in re-
42 sponse to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

The gates were coming down when the street car was at the Belt Line car tracks, 50 feet north of the steam-car track; the street car intended to stop, but the gates were raised again after the car had gotten under. I cannot say whether the gate came down on the horses or what part of it came down, because I was not looking towards the horses at that time. I could not tell which way I was looking. The gates were raised a little, the street car passed under them, and then they were lowered again and I was pushed off just as they were coming down the second time.

The witness was subsequently recalled by consent and testified, in response to questions propounded by a juror, as follows:

I occupied the end seat in either the third or fourth row. There was an iron railing at the end of the seat and an upright post, which you caught hold of when getting into the car. When I was ejected from the car I was thrown through the passageway. I do not think I was on my feet at the time, but do not know how it was possible for me to be ejected around that standard any more that I know that I was ejected. I do not remember that I had risen to my feet at the time.

Thereupon the plaintiffs further gave evidence by one CHARLES G. LENNAN, who testified on direct examination as follows:

43 My name is Charles G. Lennan; I reside in Alexandria, Va., and am a pharmacist by profession. I was coming from Alexandria that morning by the train which left about nine o'clock, and was due here in Washington somewhere about twenty-five minutes later. It was my purpose that morning to get off at the Pennsylvania station, and as I passed the scene of the accident I saw this lady lying near the track on the left side as we came into the city. The engine had then passed the street-car tracks and was then near the coffee mill of Lowdes. The train was going to- fast for me to jump off. I got off at the corner of Sixth street and went to the lady's assistance. I found her supported by two men; they took her to the coal office and I went with them. I saw her foot. They brought supports, pillows and things. I raised her ankle with my hand and saw the bones protruding through the stocking. The lady was nearly insensible, in my idea, and at *at* once suggested the administration of a stimulant. The bone, or it might have been a tendon, was protruding through the stocking. I saw blood. I do not think her stocking was removed. The lady seemed to be suffering intense pain, all of which accompanies a fractured limb. To my mind she was semi-conscious. I accompanied her home, where she was put in bed. Her foot was bleeding when I first saw

it. I could not say whether there were any bones broken or not.
I could not testify as to the rate of speed the steam car was
44 going down Maryland avenue. Is was running at the usual
rate of speed coming at that point. I do not know that it was any greater. The train was running fast, but if it was running 21 miles an hour I am not in a position to say, or 50 miles an hour; it was running fast; otherwise I should have jumped off; it was too fast for me to jump off.

On cross-examination the witness testified, in response to questions propounded by the counsel for the Washington & Georgetown Railroad Company, as follows:

I am positively certain that the train was running too fast for me to jump off. I had no purpose of getting off the train at Seventh street until I saw the lady. After I saw her I wanted to get off. As we approached Seventh street there was nothing whatever to attract my attention to the rate of speed at which the train was moving. I have been travelling on the road since 1879, and prior to the train reaching Seventh street everything seemed to be about as usual. As the train crossed Seventh street I was standing on the front platform steps of the rear car. I saw the lady as the car passed over Seventh street. She was then on the north side of the railroad track. Two or some gentlemen were with her, assisting her up. I saw that as we passed over Seventh street, and it induced
me to jump off at Sixth street. There is a curve at the latter
45 point, and they slow up and frequently stop. If they had
slowed up before reaching Seventh street it would have made no impression on my mind. I saw somebody was hurt, and I hurried back to see what could be done, imbued with that curiosity characteristic to man. I went with her to the coal office, but I am not in a position to state whether I saw more than one bone protruding. It was a mass of blood; that is all I know about the accident or the injury. I made no particular examination. I am positively certain that no fall could possibly produce such a fracture as that. I went with her to her home. I never saw her before in my life, and I have never seen her since until this morning. As we passed Seventh street I saw a street car standing near the gate, but whether it was the street car the lady was on I am not in a position to say. It was standing still with the horses facing the steamboat, and it was on the left-hand side of the train—the north side of the train—the same side on which the lady was lying.

The witness further testified, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

I am not certain whether or not the gates were down when we passed. The lady when I joined her was at the same point where I saw her. She was being assisted by these men when I got back.
She was being gathered up by these men. They were trying
46 to get her in shape to carry her somewhere. I ran back
from Sixth street. I know the lady was hurt by the way in

which she was being gathered up and her position. I cannot say that it was altogether a matter of curiosity on my part. When the train passed she was half sitting, as well as I remember, and when I got back she was in the same place, except she had been gathered up and had been moved 10 feet nearer north, towards the east side of Seventh street. She had not reached the sidewalk on the north side of Maryland avenue when I got back. I do not know whether I took her shoe off or not; it is possible that I did. I do not think the stocking was removed. I rather think she asked us not to do it. All I saw was a bloody stocking and a protruding bone. There was a temporary bandage around it by the doctor who came in and myself; then I went with her to her house. I had a very important engagement in Washington that morning. I never saw the lady before.

And thereupon on redirect examination the witness further testified as follows:

The street car that I saw as we passed Seventh street was headed towards the boat; it was stationary. I could not tell whether it was an open or a box car. It was about 15 feet away. The lady was not more than five feet away from my feet as I passed her.

The plaintiffs thereupon further gave evidence by one CASSIUS W. HORE, who testified on direct examination as follows:

47 I am a practicing physician in this city, and have been since 1886. I know Mrs. Margaret L. Hickey. I first met her on the occasion of this accident. It was about half past ten o'clock in the morning. I was sent for and went to Baum's office, near Seventh and B streets. When I got there another doctor had applied some bandages and some styptics to stop the hemorrhage. I administered sulphate of morphia to ease her pain and gave her some stimulants. Then the police ambulance was ordered and she was taken to her home, on D street. I suggested that another physician be called, and soon Doctor Hazen had arrived. We both considered that it was a serious case and that we had better get the best talent, so Surgeon General Hamilton was called in. He said it was a compound dislocation of the ankle. The foot was turned up on the inside, and the ankle—the fibula bone protruded about an inch or an inch and a half through the flesh. There was considerable laceration. The tissues and the external part of the ankle were torn and this bone was sticking through; that was about the extent of the injury. There was no great deal of hemorrhage. It was a compound dislocation of the ankle. It was set by Doctor Hamilton. The tissues and ligaments were torn and lacerated. The injury interferes, I would suppose, considerably with Mrs. Hickey's locomotion. She would lose some motions of the foot because there is no doubt there is ankylosis—that is, the parts are stiffened. There was no shortening of the limb. She was not in very great pain at her

house, because the medicine had taken effect, relieving her to
48 some extent. She was in very great pain when I first saw her. I never visited her again. The case was turned over to Doctor Hazen.

On cross-examination the witness further testified, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

I did not examine her foot. She did not make any complaint about bruises to her person or to her arm. There was no crushing of the bone; it was simply a compound dislocation. There were no bruises on the foot except where it was torn.

There were no indications that a wheel of the car had run over the foot. If the car had run over her foot it would very probably have crushed the bone. I think the injury could have been produced by jumping from the car. She must have twisted the ankle in some way, either in jumping or stepping down suddenly. I cannot say whether that would have been likely to happen if she had been pushed from the cars. She might have been pushed off and then lighted upon her foot. She will be a cripple in the use of her foot for the balance of her days.

And thereupon the plaintiffs further gave evidence by one DAVID H. HAZEN, who testified on direct examination as follows:

I am a practicing physician in this city and have been since 1873. I have been the family physician of Mrs. Hickey for
49 ten or twelve years. Prior to the accident her health was very good. I saw her on the day of the accident after she had been removed to her home; about eleven o'clock. When I arrived I found her lying in bed. She seemed to be suffering a great deal. I looked at her foot and found it was bound up. I took off the temporary dressing, and, I think, I removed the stocking. I found what we would term an outward dislocation of the ankle joint—a compound dislocation. The foot was turned clean around and the head of the fibula was driven through the flesh and extended out about an inch and a half. There was a great deal of contusion. Both bones were thrown out of place, and the joint was very much distorted. The injury was an unusual one. The foot looked rather bad. After talking with Doctor Hore we concluded to call in Doctor Hamilton, who responded promptly. He and I set the ankle joint. We administered no opiates. The foot was pulled into position with a good deal of effort and was then put into a plaster of Paris cast and remained in that way for some days and then we removed that. My idea is that in being removed or displaced from the car she had got her foot between the upright flange and the log supporting the car and had twisted her right around and thrown that ankle out of place. The injury must have been a very severe one to have thrown or driven that ankle bone through the skin and to break up the organization of that joint. I treated Mrs. Hickey in conjunction with Dr. Hamilton for five months. During that time

she suffered a great deal of pain and she was nervous and
50 I do not think she was able to get out of bed. After we set the ankle it was suspended in a sling. I do not remember how long it remained in the sling, but perhaps for two months. An abscess formed on the inside of the joint. On the whole, it was a very tedious case. After she got out of bed she was confined to the house for several months. I do not remember how many. The injury has produced a stiff joint and the foot is shortened perhaps an inch. She has to use something on the inside of her shoe in order to make her locomotion equal. This result will continue permanently. The injury will impair her ability to walk somewhat. She will have to be very careful in the use of the joint. It will be liable to accident hereafter, which might impair it totally. There is some thickening of the ankle joint. I do not remember how much. The injury is liable to shatter her nervous system somewhat. After I was called in I continued to visit her twice a day for some weeks, or months, perhaps. I ceased to visit her after the end of the fifth month. We had to give her tonics for her general health and sedative for her nervous system. The injury was a very painful one. She lost a good deal of sleep during the time. She was able to move about in bed while the limb was suspended in the sling. I examined the ankle today. It is ank*ly*osed, and the limb is shortened to the extent of half an inch or an inch. There is a good deal of thickening of the ankle joint. This condition is liable
to continue; it is bound to continue as long as she lives.
51 She is a woman of nervous temperament and always has been, though I would not like to say that this condition has been aggravated since the accident.

Upon cross-examination, in response to questions propounded by the counsel for the Washington & Georgetown railroad, the witness further testified as follows:

Judging from her condition, the female plaintiff is in pretty good health now. She weighs from 30 to 35 pounds more, apparently, than she did before the accident. From her appearance she is not going down-hill because of this accident. Future disabilities will result from an ankylosed joint, which will be permanent. She complained of injuries to her body, after the accident, in the beginning. I would not like to say that these complaints continued after six weeks. She also said there was some injury to her arm. I think I prescribed liniment for injuries other than at the ankle joint, but the other injuries were all a very trifling matter. None of the bones were broken. It was a compound dislocation. There is a big difference between that and an ordinary dislocation. An ordinary dislocation is where there is a displacement of the bone only. It does not involve any injury outside of the internal structure of the joint. A compound dislocation is where there is a protrusion of the bone through the flesh or where there is a fracture and a dislocation together. Very often, where there is a fracture and a dislocation

together, the projecting bone and the sharp edges will
52 force their way through the flesh. In this case the foot was turned clean up—almost revolved upon itself—and the fibula was driven about an inch and a half through the flesh on the outside. It naturally lacerated a good deal of the skin and the flesh where that bone protruded, and it was bound to create a yearing of the ligaments involving that joint. There were no broken bones. After the dislocation was righted I passed my finger round through the joint, and if there had been any broken bones there I would have run across some spicula of bone. The wheel of a heavily laden car could not have passed over the ankle without producing a fracture if the ankle was protected only by a stocking. If it had, the bones would have been crushed and there would have been great laceration and tearing of the muscles. The contrivance of the weight and pulley contributes very much to the comfort of the patient. It allows her to move in bed, and the plaster bandage keeps the ankle in position. An ordinary dislocation will heal from within three to six weeks. This was not an ordinary dislocation. Some patients under any injury will suffer more than others; there is a great deal of difference between the nervous systems of different people. This patient was a nervous person, and she evidently suffered a great deal of pain. I do not remember how long Doctor Hamilton treated her; perhaps six or eight weeks. After he left I had charge of the case. The patient was in bed about five months. I do not remember how many visits I paid, though I went there every
53 day for five months, I suppose. At that time she was able to leave her room, and I thought she was sufficiently well to give her a chance to move around just as she pleased. She was on crutches at first for a period of perhaps nine months; I do not remember the exact period. Then she used a cane. After the hardening process which we call ankylosis has taken place the bone is more liable to injury than a natural bone, because the joint cannot accommodate itself to the different movements and positions of the body. The limb is more liable to injury than a perfectly healthy limb, because if a strain were put upon the joint directly, instead of yielding, something would have to break. There is a good deal of difference in the structure of a joint. I do not see why a person with an ankylosed joint might not walk as far and as frequently as with a limb in the natural state. Of course the locomotion is not so graceful, but the joint ought to be, other things being equal, just as strong—strong enough to permit ordinary walking, but liable to more injury. The joint is healthy, but I do not think it would be as strong as the natural bone.

The witness further testified on cross-examination, in response to questions propounded by the attorney for the Baltimore & Potomac Railroad Company, as follows:

I think I took the stocking off; the shoe had been removed.
54 I do not remember what kind of a shoe it was. I examined the foot. I did not see any marks of a car wheel having passed over it. There was no contusion. There was nothing out-

side of what we call echymosis, a b-ack-and-blue spot opposite the side on the joint. I do not think the car wheel could have passed over the foot.

On redirect examination the witness further testified as follows:

The increased weight of Mrs. Hickey could arise from her not taking as much exercise as she formerly did. Obesity is very often caused by lack of exercise. The condition of the female plaintiff's joint renders her less able to endure the resistence, in my judgment, which an ordinary ankle in health would resist—that is, if there were any direct violence upon that point it would be more liable to succumb that it would under ordinary circumstances, because there would be no yielding. I do not think that joint is as strong as the other joint.

The witness further testified upon recross-examination, in response to questions propounded by the counsel for the Washington & Georgetown Railroad Company, as follows:

If a direct injury or force comes upon an ankylosed joint there would be no limit or movement, and it would have to stand
55 the pressure. It would be an injury resulting from want of movement in the joint so as to adopt itself to the body operating against it. I do not know that the increased weight of this lady must be attributed to inability to exercise. We see this in everyday life. The sedentary man is the fatty man.

And thereupon the plaintiffs further gave evidence by one EDMUND BROCKENBOROUGH, who testified on direct examination as follows:

I am a special officer, and reside at No. 1725 Ninth street. On the 12th of August, 1889, I was running to Collingwood beach on the excursion boat. I was an officer on that boat. I took the avenue line at Eleventh street and transferred at Seventh. It was a little after nine o'clock. The car was crowded. It was an open car. It was a very warm day. I stood on the side of the car, the left-hand side going towards the boat, about four seats from the front. I noticed the plaintiff on the end of the seat, on the seat just ahead of me. The conductor was standing on the rear of the car at the time. When we got to Maryland avenue the first thing I noticed was the gates coming down and the cars stopped sudden. I looked up and saw the engine coming. Everybody sprung up in the car, and the gates went up, and just at that time they came down and caught the horses. The horses were inside the gates and the car was on the outside. The car was standing
56 right across the steam-railroad track, and just at that time the gates went up and the driver whipped the horses through. Everybody sprung up in their seats just at that time and commenced hollering. When I first saw the engine it had passed over Eight- street, coming right straight down to the watch-box, where the man hoists and lowers the gates. It was coming pretty fast,

but I could not tell the rate of speed. The gentlemen that were sitting down all got up, and the ladies commenced screaming. I stood on the car and tried to keep the people near me in their seats. I said, "Hold still a minute," and by that time the driver commenced whipping his horses, and I thought that he would get out. The people in front of me commenced shoving and tried to get out on that side of the car; several got off. I saw a very stout lady, who looked to weigh a couple of hundred pounds. She was sitting, I think, right next to Mrs. Hickey. She jumped up and hollered, "My God," and she screamed and rushed towards Mrs. Hickey and the gentleman behind her, right against her, and the next thing I saw Mrs. Hickey was on the track, the steam-car track. She did not jump off there; there didn't anybody jump off. I was about the only one that jumped off. After the street car was going through I kind of jumped off, and the others got off after the car stopped. The car stopped after it got through. Mrs. Hickey was pushed off right in
57 the center of the track. The car stopped in the center of the track, and the horses were on the inside between the two gates. There are two tracks, you know—there is only one track there, but the car was on the other side of the track, and the car stopped right across—just right as you cross. The horses were south of the single track. The car was on the track, and the gate came down right behind the horses. After that I jumped off. I saw Mrs. Hickey when she fell, and the engine was coming down, and the car pulled right through, and after the car pulled through I jumped off and started to go towards her, but the train was so close to me that I did not get to her at all. I had to wait until the train pulled by. When she was pushed from the car the engine was no- very far away. It was close to where the man stands that lowers the gates. After the train passed Mrs. Hickey was down and could not get up, and I went across there, and there was a white gentleman there. I do not know who he was. He was helping her up, and I went up to her and helped her, and she tried to stand on her feet and could not stand up. He says, "Some of the limbs are broken." She asked for her umbrella and pocket-book. I took charge of the pocket-book. We took her to the office in a coal yard. She told me her name and her husband's name, and asked me to telephone. I went to the box and got a man to telephone Mr. Hickey. The conductor of the car came back and said to me, "Will you stay by her and help?" He had to go on down. He wanted to know whether she was hurt bad. I never saw Mrs. Hickey any more until the other day I saw her here in court.

58 On cross-examination the witness further testified, in response to questions propounded by the counsel for the Washington & Georgetown Railroad Company, as follows:

When I made the statement shortly after the accident I told the gentleman who asked me whether Mrs. Hickey jumped or fell from the car that when I saw her she was out on the ground. I could not tell whether she jumped or not, but I was under the impression that she was shoved out by the crowd on the same seat. A large

lady was sitting next to her and several gentlemen on the right. That is the time when they all screamed. They made a rush to get out. Mrs. Hickey was then at the end of the seat. The next thing I saw she went over—tumbled. I could not tell whether she was shoved or what she done, but I know she fell over that way. My impression was that she was pushed, but I cannot swear that she was pushed, because I do not know, because I did not see them put their hands on her, but I know they rushed that way and I saw her tumble. I certainly do not know she jumped off, and I saw the crowd rush towards her. I do not know whether it was a push or a jump. I do not know anything about it, any more than just to see her tumble like that (indicating) when the crowd pushed forward. Just as the car got on the track the gate came down and across the hips of the horses, and the car stopped right still. The horses passed under, but the car did not. Both gates came down together; they were up when the horses reached it. The gate came down and stopped the horses. and the very minute the car
59 stopped it caused me to look out. I thought *it* was something wrong, and looked up there and saw the engine coming. When the car passed through, the north gate was up. It had hoisted up again for the car to pass through; it let down just as the horses came through. The driver stopped the horses. When the horses were going through they lowered the gate and cut the car off like. The first gate we came to came down just as the horses got across the steam-car track. The horse- were inside the gate and the car was shut out on this side of the gate on the steam-car track. At that time everybody screamed out, just at that moment. Before the gate was lifted everybody tried to rush out of the car. They sprang right up in their seats and commenced hollering. Just at that time the engine was very close to us, about as close as that door (indicating). I did not see the steam cars until they first lowered the gates. The car stopped entirely, because they acted like they were confused and did not know what to do. The car was on the track; the horses were inside. The second arm of the gate near the river had come down on the hips of the horses. I saw the arm coming down when the car slacked up. This is the time I looked and saw the engine coming. It was this side of Eight- street, coming straight down the track. It had turned the curve above Eight-street and was coming down to Seventh street. I could not say how rapidly it was coming; I know it got down there mighty
60 quick. That is all I know. I got off the car and helped the lady, and took the second or third car afterwards and got to the steamboat. It waited for me, because some one told them that I was helping a lady who had her leg injured. When I first saw Mrs. Hickey she was lying right on the steam-car track. I saw her sort of rolling *iff*, dragging herself off the track. The conductor came back after the car stopped. It stopped after we got out of the way of the engine, and the conductor came back to see who this lady was, and if he could render any assistance. He took my name, and when I got down to the boat they came over to see me and had a talk with me. I got off the street car just about the time the

engine was passing along and waited until it got by. This was about three or four feet south of the railroad track. The street car was moving when I got off.

The witness further testified on cross-examination, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

The street car was going at the usual rate until it got to Maryland avenue. After we stopped to let some passengers off at the Medical museum we did not stop again, to my recollection, before reaching Maryland avenue. I was standing on the left-hand side of the car, holding onto an upright, facing the river. I was about the fourth seat from the front. I think Mrs. Hickey was on
61 the third seat. The car was very crowded with people, you know. I was standing on the left-hand side. I do not think there were more than three or four people on that side. There was a colored man standing there above me and the others were behind me. As we approached Maryland avenue the first thing that attracted my attention was the gates coming down. The horse car stopped right at once. When I noticed the front part of the horses' heads were under the gates, and by the time the gates got down it just about hit the horses. I do not know how long it takes for the gates to come down. I have been there a great many times, but never noticed this. I have been on horse cars when it was stopped by gates coming down, and have been detained sometimes a minute and a half or two minutes, waiting for the train to pass. I do not think it would take half a minute or a minute for the gates to come down. The car was pretty well crowded, but I do not know how many people were on it. Some were standing on the front platform with the driver and some were standing back in the rear and some on the sides. When I saw Mrs. Hickey falling out I did not catch her because I tried to catch somebody in the seat where I was at. I tried to keep them back. When I looked she tumbled right over, and this other big lady was right at the seat, and the conductor commenced to hollering then. The big lady tried to get out. I did not hold her. I do not know who else besides Mrs. Hickey got out. There did not anybody get out there until they got the car sort of across the track; then several got out. I
62 do not know why they got out after crossing the track; I suppose because they saw Mrs. Hickey; that was the reason I got out; I would not have got out at all if it had not been for that. When the steam car passed I was on the south side, next to the river. I started to run across, but it was too close for me to run across and I had to wait until they got past me. I do not know how far the engine was away when the street car crossed the tracks, but it was just on the opposite side of the street like, coming down the tracks, and between us and Eight- street. I could not tell how fast the train was coming. I do not know whether a man or a woman pushed her off; the lady was nearest to her. It seemed to me like everybody in the car sprang up at once. I had been standing all the while, and when the car got down there everybody

sprang up. It was a very excitable time. I got a little so. I thought we would be hurt sure enough. I was looking out for myself. When I found the driver was whipping up his horses I waited on the car.

And thereupon the plaintiffs further gave evidence by one JOSEPH H. MANNING, who testified on direct examination as follows:

I am twenty-one years old. When this accident happened I was living at No. 604 Maryland avenue southwest. My house is the first house from Sixth street. I am employed by Mr. Den-
63 ning down at the Baltimore & Potomac depot. At the time of this accident I was at Seventh street and Maryland avenue, standing there. I had just left the little lot in front of Lowndes' coffee factory, where I had been playing marbles. I came over on the corner right near the lamp-post on Seventh street and Maryland avenue. I knew the train was due there at that time—the local from Alexandria. The street car was coming down, and when I noticed the train it was just at the Eighth-street bend. The street car was then crossing Maryland Avenue line, the street-railway horse cars on Maryland avenue, and the man at the gates hadn't started to lower his gates. Then this car was still coming, and the train was coming, and the street car started under, and the gate-tender had let the gates down, and the street car passed through, and the man let the gates down on the car. The horses had gone through. The horses were on the side of the river from the track and the car was between the gates. Just at that time, when everybody saw the train approach, everybody hollered. The car was very crowded, and Mrs. Hickey was shoved from the car by the people shoving her; I saw it with my own eyes. She did not jump from the car; she was shoved. I did not notice who shoved her off; I was pretty scared. I saw the train approaching, and I thought there was going to be a collision. She fell right between the steam-railroad tracks. As the train passed, the engine went very near her. I was on the same side when she fell off, a very short distance from her, as far as from you to me. The injury was occasioned by the car wheel passing over her foot, a back wheel. This was the street car; the railroad train did not touch her at all. After it happened I ran over to her, and there were two men there.
64 I do not know whether they were colored or not. They went over to her and were going to take her up and she asked for her pocket-book and umbrella and made the remark, "I just left my husband at Seventh street and Pennsylvania avenue." They then took her to the office of Baum's coal yard. I went and got a pillow and they raised her foot on the pillow and took her shoe off. Then the ambulance came and I went home with her. The grade is down from Eight- street to Seventh. A train could get a good start. The track is straight until you get near Sixth street and then it curves. I do not know how far exactly Lowndes' coffee mill is from Seventh street. The train was coming not too fast—no more than it usually generally always comes. After it cleared the steam rail-

road the street car stopped and the conductor came back. I do not know what he said. He said something to some men and went back to his car again and on down Seventh street. The gates started to let down as they approached, and when the horse- got through the gates let right down on the car. The horses were on the side next to the river and the car was between the gates. Then the people hollered and all made a rush. The car was pretty well crowded and I saw this lady fall. I was on the east side of Seventh street, north of the railroad tracks.

On cross-examination, in response to questions propounded by the counsel for the Washington & Georgetown Railroad
65 Company, the witness further testified as follows:

I was sixteen years old when this accident occurred. I saw the car wheel go over the lady's ankle—the back wheel. I saw her ankle under the wheel and when the car passed over it and she rolled out. I saw her foot hanging. It was not entirely off. It was held by the skin. The stocking was cut entirely.

And thereupon the plaintiffs further gave evidence by one PRESTON BROOKS, who testified on direct examination as follows:

I am a paper-hanger and reside at No. 467 Armory place. In August, 1889, I was a waiter at River View, going down every day and coming back at night. On the occasion of this accident I was on the street car, standing on the east side. As we were going down at Seventh street and Maryland avenue the gates were lowered. The street car stopped. Then the gateman raised the gates again, and, of course, the car started through, and just as it got into the middle of the gates he commenced lowering them down again. Then they all jumped up in the car, and some one cried out the train was coming. I did not see any train, because I was on the east side, and, being excited, I looked and did not see any. I was real frightened myself, although I did not jump off. At that time Mrs. Hickey came off the car and knocked my arm. I was standing with my face towards Mr. Brockenborough. I just shifted myself around and caught with
66 the other hand to the car. I did not get off the car at all. I saw her lying there. I was real frightened and I did not know hardly what to do, so I stayed on the car. Then a white man I did not know and Mr. Brockenborough went to the assistance of this lady, so I did not get off the car at all until it got through the gates. Being in a hurry, I started down Seventh street on foot; the car caught me somewhere near G street and I jumped on again and went to the wharf. I was on the east side of the car, standing about the third seat from the front. I was facing north, talking to Brockenborough. The street car stopped before it got to the steam-railroad tracks. I judge it stopped on this side of what they call the Belt Line tracks because the gates were lowered; then they raised them again afterwards and the car started through and then the gates came down again. I seen them myself. I think the

gates came right down on the horses and caught the horses kind of and stopped the car. I saw them coming down. I was so scared I could not jump for myself. I acted so scared I did not jump for myself until the car got through. I did not know which way the train was coming. I was real frightened. The street car stopped right between the tracks. The crowd was thick in the car, you know, and they were all standing up and the train was coming from towards the Long bridge and I didn't see it. I could
67 not tell how many people were on the seat with Mrs. Hickey. I do not think there were any vacant seats. I saw her when she came out of the car and struck against me, but I was not looking at the time. She struck against me as she came out of the car and just wheeled me around and I caught myself with the other hand. I saw her fall to the ground, but do not exactly know which portion of her body struck the ground first. I was really right excited and I did not exactly notice. I saw her fall and she looked to me like she was lying across the track. I do not know which way her head pointed, but I think her face was towards the north. I did not see any one else get off the car. I do not exactly know whether she was shoved off or jumped off; she came off very suddenly; I think she was shoved off. I saw the engine after they raised the gates the second time and let the car through. I saw the conductor on that occasion; if I am not mistaken he was in front, collecting the fares; he stopped the car at the corner, I think, near C street, and came back. Going south on Seventh street, as you come to the north line of Maryland avenue, you can see as far up Maryland avenue as Ninth street. As near as I can judge it is about fifteen feet between the north curb line of Maryland avenue and the north rail of the Belt Line tracks. The street car was going that morning just about as usual.

On cross-examination the witness further testified, in response to questions propounded by the counsel for the Washington &
68 Georgetown Railroad Company, as follows:

I was on the east side of the street car that morning and did not see the train until the time of the accident. I only heard the people hollering that the engine was coming or the train was coming. I did not see the train until the street car got through the gates. I was not doing anything except standing on the car when this lady struck my arm. I had my face this way, as I said before. I do not know what her movements was before she struck my arm. After that I saw her on the ground. I was holding onto the rail, and that very near put my whole form in the aisle of the seat where she was sitting, and as she came out she struck my left arm. I was right excited. The north arm of the gate came down just before the car got through, and then it was lifted. The gates were lowered first and the car stopped. Then they were lifted again and lowered again when the car was on the steam-car track. I think they caught the horses in the gate, though I do not know exactly how. I think the south gate caught the hind quarters of the horses and the other gate was on the body of the car. Mrs. Hickey was the only person

I saw leave the car. There were a good many women and children on it. I know there were a lot of ladies. I think they were going on an excursion, because a lot of them got on the boat I was working on, and they were talking about it on the boat. When the gates came down the second time on the hips of the horses
69 I think they were obliged to stop; the car stopped. It was when the car stopped after the gates were let down on the horses or near the horses that the lady came off the car and knocked against my arm. Then the gates were raised again and the car went beyond the gates.

The witness further testified on cross-examination, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

I stood up that morning because the car was so crowded. I could not have sat down if I wanted to. There were people on the front and back platforms and on the running boards on each side of the car. I was looking north when the car got to Maryland avenue. I turned around after the lady knocked against my arm. When the *steam* car approached the steam-car tracks the gates were coming down. That was before the lady jumped or was pushed off. Where I was standing, very near the front of the car, you could see almost behind you. I was looking north, holding to an upright, and I saw them coming down as the street car approached. It did not go all the way under then, because it was caught right there and could not get through. The street car did not start again until the gates were raised. I might have seen Mrs. Hickey before the accident, but I did not know her. I did not see her get up. The first time I noticed her was when she touched my arm. I heard two or three hollering before that. I saw a big, stout, yellow colored lady scream. She was standing about the middle of the car, I think. That was behind Mrs. Hickey. I think
70 she tried to get off, but there was a lot in front and on each side of her, and I suppose that is the reason she didn't get off. The gates are worked by a crank, I believe. The man who works the gates stands south of the railroad tracks, I should judge about 10 feet from the place where the street-car track crossed the railroad tracks, or probably it is a little more than 10 feet. I do not think it is 50 feet. The gateman stood back of the sidewalk. I have seen these gates coming down. Sometimes they come down pretty fast; sometimes they slow them down. I judge it would not take them more than half a minute if he wanted to let them down right quick. I did not see the engine until after the car got through. I could not see it before that time. I was looking east and I thought maybe it was coming down Sixth street. I could not see through the car, it was so crowded, and I did not know which way it was coming. I only heard them screaming and hollering that the train was coming. I could not see it, and, of course, that excited me, but, being a man, I did not jump off. I was frightened; that is the truth. When I first noticed the gates they were down. I did not know what they were doing down. The horse car had stopped on this

side, what they call the Belt Line track, north of the Belt Line track. The gates were then down. Then they were raised again,
71 and as the horse car approached the gates were coming down and the car drove underneath those gates as far as it could go. I did not see the train, because all of the people were hollering and whooping and standing up, and it was impossible for me to see through the car. I was on the east side of the car and the train was coming from the west. I looked towards the east, but did not see any train coming that way. I was excited and did not know hardly what to do. I looked west, but I could not see through the car to save my life.

And thereupon the plaintiffs further gave evidence by one JOHN S. MCCOY, who testified on direct examination as follows:

I live at No. 151 N street northeast, in Washington, and am a lamplighter by occupation. In August, 1889, I lived on Fourth street between M and N and was then working at some buildings on B street southwest. I was standing at the time on the west side of Seventh street and saw this accident. I saw the street car coming down Seventh street. The driver seemed to be making up for lost time, and I saw the engine coming down Maryland avenue very fast, I should judge 15 miles an hour. I worked on the railroad for three years and have jumped aboard a train going 12 miles an hour, but I would
72 not have undertaken to have jumped on that train. When I first saw it the street car had crossed the Belt Line track and reached the first gate going south. The gates came right down on the horses' backs. At that time the steam car was about 60 or 70 feet from the Seventh-street crossing. The first gate going south came down on the horses' backs. The horses seemed to be out of the drivers' control. He tried to go ahead, but could not on account of the gates. The gateman raised the gates, and the driver struck the horses, and just as the street car went over the steam-car track a man sitting beside this lady pushed, and she fell off the car on the steam-railroad track and rolled over twice. Just as that happened I ran and grabbed her. I says, "Get up and get off," and she says, "I can't; my foot is off. You go and get my pocketbook." I saw the two colored men that jumped off the wagon, and I gave Mrs. Hickey in their charge and ran back for the pocketbook. There was a colored man running across from the Virginia-avenue side with her pocket-book, and I picked up the umbrella and took it to her at Baum's office. I do not know who the man was that shoved Mrs. Hickey off the car. He was a very tall man, and he ran down Maryland avenue. I saw him when he shoved her off. I was right on the Belt Line car track. I knew by the looks of the thing that there was going to be an accident, and I ran towards this car. I was on the east side of Seventh street, the side the lady was pushed off, probably about 30 feet away. I saw everything that happened. It was an open car, and I was looking right at her.
73 When the street car cleared the steam-car track the engine was right on top of it. It happened quicker that I am tak-

ing to tell it. The street car had no more than got across the steam-car track than the engine went right by just like that (indicating). I did not notice what part of Mrs. Hickey's body struck the pavement first. After she struck the ground she rolled over twice and tried to get up just as I ran and grabbed her. She rolled towards the east, and her foot went right under the hind wheel of the summer car. I saw this. I was looking right at her. The car seemed to go up like it was going over something, and she said, "My foot's off." She had pulled her foot from under the car first. She rolled off the steam-car track towards the southeast, of course. When the engine passed I had her, dragging her towards the Belt Line car track. I could not say how far she was when she fell, because everything was in excitement. When I had her after the engine passed she was about 10 feet from the steam-car track. She rolled towards Sixth street—towards the north. It was a clear day and very warm. I was going to the pump that stood on Virginia avenue, a little below the corner. I had occasion to go there half a dozen times the same day to get water. The watchman did not seem to be out at all until the train got right near the Seventh-street crossing. He came rushing out of the box and put
74 the gates down right on the horses' backs. The driver of the street car seemed to be running a race with the locomotive. There were people standing on the west side of the street car, which was pretty well crowded, and they were jumping off in every direction. I think 10 of them must have jumped off. There was a lot of people on it yet. After Mrs. Hickey was carried to Baum's office I saw her, and she asked — to send for her husband. I went down to the buildings where I was at work and asked if I could not go, and when I came back and asked where she lived somebody else had gone there. I did not see her foot. She complained of her foot and her leg, and she told me her foot was off. They sent for the doctor while I was in the office.

On cross-examination the witness further testified, in response to questions propounded by the counsel for the Washington & Georgetown Railroad Company, as follows:

I have been in this city five years this coming July. I was in the laboring business. I mostly working for carpenters—helping around buildings, laying floors, &c. I am 48 years old; an unmarried, and am living with my brother. The accident happened on the 12th day of August, 1889. It was between nine and ten o'clock. I had occasion to go twice that morning to this pump. When I went out I asked Mr. Kirk if I could go. I had to get his permission to go to the pump, and he told me to hurry back, as it was after nine o'clock. Mr. Kirk is a carpenter. I was
75 taking a bucket with me to the pump. I was a brakeman for three years up in a little place called Mauch Chunk. I was standing on the south one of the Belt Line tracks. The cars was going very fast. The steam car was going about 15 miles an hour, and when I first noticed it it was about 70 feet west of the Seventh-street pavement. The lady was pushed off. I saw a tall man jump

and push her and she fell. He was a big tall man and a pretty stout man; he would weigh over 200 pounds. What called my attention to him was that instead of stopping to see whether the lady was hurt or not he ran down Maryland avenue. I did not see the gates come down the second time. The gates were not down in the beginning; they did not go down at all until the horses were right on the track, because the gates on each side of the track were not more than four or five feet apart. When the street car approached the north gate it was not down. It did not go down until the horse- were right under it, and then he lowered it on their backs. The horses were then just beyond the steam-car tracks. One arm of the gate was not on the street car. The north gate was on the horses' backs and the south gate was facing the horses—towards the horses' heads. When the horses approached the steam-car track no gates were down. They did not come down until the horses were on the steam-car track. They went down and right up again. The man saw the train coming and he seemed to me as if he was asleep in his box. He rushed out and pulled up the gates and the driver struck the horses. I do not know whether the gate came down after that, because I had Mrs. Hickey, and it was as much as I could do to attend to
76 her. I did not take notice whether or not the gates came down after that. I know the first time they were not down, only when they were allowed to come on the horses' backs. Mrs. Hickey was on the third or fourth seat from the driver, and she fell right on the steam-car track and rolled over toward the north; like rolling up Seventh street. I could not say how long she was on the ground before the steam car passed by; it was done so quick; it was less than a minute and more than a second. While Mrs. Hickey was on the ground her feet were close to the steam-car tracks. I had her in my arms when the engine went by; between the Belt Line tracks and the steam-car tracks. I had time to go and pick her up before the train passed by. I went from the Belt Line tracks and picked this lady up from the ground. She had rolled over twice and tried to get up and walk before I got to her. I had time to go to her and pick her up before the train went by—towards the east. I had just time to run to her and pick her up when it went by. When I picked her up she was about six feet north of the steam-car tracks. She had then rolled over and tried to get up and walk. It was less than a minute before the train passed, because I had not more than got the lady in my arms when it went by. The lady seemed to be in pain; she did not complain. I kept on doing the best I could to get — away as quick as I possibly could.
77 I did not see the lady's foot on the street-car track. I saw the car rise up like as if it had run over something. If I had thought the lady was run over I would not have told her "to hurry and get up and walk." When I told her she said, "I can't; my foot is off." Then I knew she was hurt. I could not say that her ankle was touched by the street car. I thought it was her foot from the way she fell, and that it had gotten under the hind wheel of the street car. I am not positive of that. I read in the paper

that her ankle and leg was broken. I thought her ankle was crushed when we carried her into the office. Her foot must have fell near the hind wheel of the street car, because she was sitting between the third and fourth seats from the driver. I did not take any notice of where the street car stopped; it was on the other side of the track. As soon as I got her off I ran back and the crowd was gathering around there, and I did not see any more of it. I had not crossed the Belt Line tracks when the steam car passed. I had probably gone about 10 feet with her. When I picked her up I grabbed her around the waist. There was no one there until I gave her in charge of a colored man. I helped her to about the middle of the north Belt Line track. The steam train went by as soon as I got hold of Mrs. Hickey. I have not seen her since. She told us before starting to go back and get her pocket-book. She had her umbrella there in the street; I picked it up. The umbrella was lying six feet away from the street-car track. I delivered her to two colored men. They were on the pavement.

78 The witness further testified on cross-examination, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

I was at work that morning at Bernheimer's, on B street west of Seventh. I went down on the west side of Seventh street and then crossed over to the east. The horse car passed me when I got to the northeast corner of Seventh street and Maryland avenue. Just as I got to the Belt Line track the engine at that time was near Eight-street. The gateman did not begin to let down his gates until the horses were right on the track, and then the engine was between 60 and 70 feet from the Seventh-street pavement. The engine was in full view. The gates ought to come down in less than a minute. They cannot put they down instantaneously. They are ground down with a crank. It takes from half a minute to a minute to let them down. The gateman has a box on the west side of Seventh street south of the steam-car tracks and west of the sidewalk. I judge it was about 25 feet from the gateman's box to the railroad track where it intersects the street-car tracks.

And thereupon the plaintiffs further gave evidence by one GEORGE B. PHILLIPS, who testified on direct examination as follows:

I am porter at Carter's hardware store and was so employed in August, 1889. I remember this accident, but not the date
79 when it occurred. It was about five years ago. I had been that morning to the steamer Tygert with three kegs of horseshoes and was on my way back, coming up the east side of Seventh street. When I got to the corner of Seventh street and Virginia avenue I saw a steam car coming from Eight- street. It had not quite got to Eight- street. I drove over the track and afterwards saw the street car coming across C street. I looked back to see whether the train was going to pass before the street car passed, and just as I looked around I saw the gates coming down in front of the car. I

do not know whether they struck the horses or not; I was too far off for that. The car stopped. The steam-engine had not quite got over there. It was 50 feet or so away, coming pretty swift. All the people in the street car began to holler. There was ladies standing up on the east side, anyhow. I saw five or six get off the car. After she rolled out I saw a man run and catch hold of her and then the steam car passed. It seemed to me as if she was then almost underneath it. I stopped my wagon and ran back to help. I caught hold of her and started towards the coal yard with her, and two or three other gentlemen came up and said, "We can attend to her;" and then I let go, but I still went on to the coal yard. She was suffering. I saw her foot; it was hanging; turned right around. It was turned around that way (indicating).

80 On cross-examination, in response to questions propounded by the counsel for the Washington & Georgetown Railroad Company, the witness further testified as follows:

I was near Seventh and C streets when my attention was first attracted to the street car. My horse's head was on the Belt Line tracks. I drove over the steam-railroad track to keep the train from killing me. I did not think the street car would drive over after such a narrow escape as that I had. I noticed the steam car before I attempted to cross the track. I first noticed the steam train when I was on the south side of the track, but I did not notice the street car until I got on the north side. I saw the street car going so fast that I wondered whether it was going to try to get over before the steam car got past. I was looking towards the north, and after the street car passed along I looked around towards the car to see if it would get over. The gates were not down when I passed; there was not anybody out there to let them down. I stopped my horse and looked back and saw the gates go down. I got out of my wagon as soon as I saw the lady fall. I saw the gates come down; it came down right on top of the car; it was then raised right up again. The train was pretty close; as near as from here to that door there (indicating). It was coming pretty fast, but I do not know how many miles an hour. It was going as fast as it goes over here by Alexandria; faster than the electric cars go. It seemed to be going faster than I have seen it go a great many times in passing
81 by there. When I looked back the train was between Seventh and Eight- streets. I judge it was about 70 feet, or something like that, between Seventh and Eight- streets. The lady left the car all up in knot. I do not know what made her leave. I saw a lot of people behind her. I do not know how she left the car or why she left it or what impelled her to leave it. I saw the gates come down, and go up and down after the car went through. The steam train went by after the gates came down a second time. I did not see the lady's foot under the wheel of the car, but it was laying that way. I did not see the wheel of the car going on her foot, but I saw her foot dangling afterwards; turned over the wrong way. It appeared to be crushed. I thought the stocking was only holding her foot. I was not much excited on that occasion. It

looked to me as if five or six or seven people got off the car on the east side. There were men and women and children on the car with baskets. I met the street car at C street, about at the Belt Line tracks. It looked as if the street car was trying to beat the steam car—trying to get through before the steam car got through—and no gates were down at that time.

On further cross-examination, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, the witness further testified as follows:

82 I did not see the gates when they started to come down. I noticed them coming down just after the horse car had got through. The horse car was going pretty swift, as fast they ever go. They were not going as fast as the locomotive. I guess they were going about six or eight miles an hour. The street car had to stop because the gates came down; they did not stop more than two or three minutes. The gates are made of wood. It takes a pretty good jolt to break them. I saw one of them broken once by Knox's express wagons. I do not know how long it takes for the gates to come down; I have seen them come down; I did not time it. I do not know whether it takes a minute or not. The gates were raised up quicker that day than I ever saw them raised up for a long time. It was a pretty quick move all the way through. In answer to the question, "Do they raise" the gates instantaneously or do they have to turn a crank and grind them up slowly? the witness answered, "They turn a crank." I think they take two or three minutes to come down. The train was about Eight- street when I crossed the track; it had not gotten quite to Eight- street. It crossed Seventh street while I was at C street. I had stopped my wagon about a minute, I guess; hardly that. I stopped to see which was going to beat, the locomotive or the street car; the street car beat the locomotive. I think the lady's right shoulder struck the ground first.

And thereupon the plaintiffs further gave evidence by one REBECCA MANNING, who testified on direct examination as follows:

83 I have known Mrs. Hickey since infancy. She lived two doors above my house. I saw her a number of times during eight or ten years before the accident; every day, I guess. She seemed to be in perfect health. I was at one time a servant in her family. I went there on the 1st of August, 1889, to do general house-work. Mrs. Hickey was married and was then living with her husband at her mother's house. I remained in the family as a servant four months. I was there when she was brought home, on August 12th, in the police patrol. Her ankle was broken. She was carried upstairs. The bone was protruding through the skin; it was very bloody. The skin and tissue was torn; she seemed to be suffering immensely. She complained of her ankle. I never noticed that anything else was the matter with her. I never heard of anything else. Mrs. Hickey suffered intensely during the time

I was there. She was crying and fretting continuously, and seemed to be very nervous and in very great pain. I think she left her bed about the last of October. She would then sit in a large chair. She would motion herself from the bed to a chair and then her foot had to be set on the chair from that. She was confined to her room for a month after she got out of bed. Her suffering was then very severe. Her foot had on it a rubber bandage. During the time she was in bed she did not sleep at all. She could not sleep. After she got out of bed she was confined to her room about a
84 month. In a month she used it with the aid of a crutch and a cane. I do not know how long she used crutches. I left the 1st of December. I went to visit her home a week after that. After she got out of her bed her ankle was very much swollen and the veins around seemed to be very dark. I have not seen her foot for a couple of years. She then told me it was very painful.

On cross-examination, in response to questions propounded by the counsel for the Washington & Georgetown Railroad Company, the witness further testified as follows:

I never lived with Mrs. Hickey before the 1st of August, 1889. She was in bed during August, September, and October. All the time she was in bed her foot was suspended with a pulley and weight. When she left her bed the pulley and weight was dispensed with. When I left she was still in her room and using crutches. I saw her using crutches from December up until March.

On redirect examination the witness further testified as follows:

Mrs. Hickey used crutches until March and a cane for quite a while after that. She moved away in May, 1890, and was using a cane then. Mrs. Hickey's family consisted of three persons—her father, her husband, and herself. Her mother was not then living. She has no children.

And thereupon the plaintiffs further gave evidence by
85 one OSCAR A. STEVENS, who testified on direct examination as follows:

I am now manager of an insurance company. From 1872 to 1877 I was general agent of the Baltimore — Potomac Railroad Company. I know the single track that runs up Maryland avenue between Sixth and Ninth streets. From 1872 to 1877 it was under the management and control of the Baltimore & Potomac Railroad Company and is still. A man by the name of McKeever is now the representative in this city of the Baltimore & Potomac Railroad Company. The Baltimore & Potomac Co. either said or relaid that track on Maryland avenue between Sixth and Ninth streets.

And thereupon the plaintiffs further gave evidence by one DANIEL P. MCKEEVER, who testified on direct examination as follows:

I am now train master of the Philadelphia, Wilmington & Baltimore Railroad Company. On June 12, 1886, I became train master

of the Baltimore & Potomac Railroad Company and so remained for four years. During that time the Baltimore & Potomac Railroad Company operated single track along Maryland avenue from Sixth to Ninth streets.

And thereupon the plaintiffs further gave evidence by one ALICE O'HARA, who testified on direct examination as follows:

86 I reside in this city and am by occupation a professional nurse. I have been engaged as a trained nurse for five years, and have been nursing off and on for eighteen years. I first attended Mrs. Hickey some time in August. I went to her house about three days after the injury. She was then very nervous and suffered a great deal of pain. There was an open cut or wound half way around the ankle. I attended her seven weeks. During that time she suffered the most intense pains that I ever witnessed in any one. She slept very little. She was given morphine and bromide to produce sleep, but it seemed to have very little effect. She slept probably an hour after taking three doses. The wound healed by suppuration and discharge. It discharged a great deal—half a pint, and sometimes less—when the wound was dressed. She was in bed all the time when I was there—on her back. I do not think she could move towards the side at all. When I left her she was stronger and had more flesh, but she was still suffering pain. The wound was healing. She was then more nervous, and noises on the street seemed to have a terrible effect upon her; it made her nervous and broke her up generally. The ankle was very much swollen on the outside. The open wound was on the outside of the ankle. The joint was very much swollen on the inside, and it looked as if it was gathering. Doctor Hamilton punctured
87 it with an instrument to inject a solution into it, and it discharged matter. That had to kept open. When it was necessary to dress the foot, two men generally lifted the body up and the things were removed from under the leg before it was suspended. That operation must have been a very painful one.

On cross-examination the witness further testified, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

I never before attended a patient with a dislocated ankle, but I have had one myself. I never passed an examination as a trained nurse. I was only trained in the Columbia hospital. I left Mrs. Hickey at the end of seven weeks and did not see her afterwards. She was then somewhat stronger in body, but her limb being suspended, she was in a very painful position. The weight and pulley must have been terribly inconvenient. It is a contrivance to prevent pain. No one took my place after I left. I did not call afterwards. I called on the doctor once. When I left I thought Mrs. Hickey was over the worst. I really do not know why it is she has been getting fatter since. I think she is disposed to be fleshy. I take it that way, and then the nourishment she took may have had

something to do with it. After I left I heard her mother-in-
88 law attended her. Then there was a nurse in the neighborhood—a colored woman—who was very efficient and whom I had known from childhood, and I knew she would not suffer. I was perfectly satisfied that she would not suffer.

And thereupon counsel for the plaintiffs offered in evidence, to be read to the jury, section 15, article 10, of the Police Regulations of the District of Columbia (published in 1887) and in force Aug. 12, 1889; to which offer, at the time it was made and before the said article 15, section 10, was read to the jury, the Baltimore & Potomac Railroad Company, by its counsel, objected, upon the ground that the declaration did not aver that the train of cars approaching Seventh street from the west at or about the time of the accident was being run at an unlawful rate of speed; but the court overruled the said objection and allowed the said section 15, article 10, of the Police Regulations of the District of Columbia (published in 1887) to be read to the jury; to which ruling of the court the said defendant, through and by its counsel, then and there excepted, and prayed the court to note the same upon its minutes, which was done.

And thereupon, after the foregoing proceedings, which are hereby made part hereof, the said section 15, article 10, was read to the jury, as follows:

89 "SECTION 15, article 10. Steam cars, trains or engines shall not move upon any street or avenue at a greater rate of speed than six miles an hour, and no steam car, train or engine shall be stopped or held at a street crossing or intersection so as to obstruct the passage of vehicles or foot passengers for a longer period of time than is needed for the passage thereby at a speed not less than five miles an hour."

Thereupon the plaintiffs further gave evidence by one DANIEL P. MCKEEVER, recalled, who testified on direct examination as follows:

I know where the gates are located at the corner of Seventh and Maryland avenue southwest in this city. I do not know by whom they were erected. I am not positive by whom they were operated in 1886, 1887, and 1889.

And thereupon the following question was propounded to the witness by the counsel for the plaintiffs:

"Q. What connection did you have with those gates during that time, from 1886 to 1890—during the time you have said you were trainmaster?"

Upon the propounding of which question the following proceedings took place:

Mr. MADDOX: I object to the question.

Mr. COLBERT: I want to prove his opportunities for knowledge, if your honor please.

The COURT: I think it is fair enough, for the purpose of
90 laying a foundation.

Mr. MADDOX: I will note an exception.

By Mr. COLBERT:

Q. What connection did you have with those gates?
A. No direct connection—that is, not directly under my charge.
Q. Under whose charge is it?
A. It is under the charge of the supervisor.
Q. The supervisor of tracks?

Mr. MADDOX: I object to the question.

Mr. COLBERT: Which question?

Mr. MADDOX: I object to this line of inquiry. It is an indirect effort to show by this witness, if it be possible, that this gate-keeper was somehow or other in the employ of the Baltimore & Potomac Railroad Company.

Mr. COLBERT: I do not care whether he was or not. I am not asking him about that.

Mr. MADDOX: Yes; you are trying to extract that testimony from this witness. I object to any such inquiry under these pleadings.

The COURT: It is clear enough, I think, that the gate-keeper was a servant of one of these companies, and he is charged with negligence. You took no demurrer to the declaration, and I think it would be proper now, upon the trial of the case, to permit the parties to prove whose servant the gate-keeper was.

91 Mr. MADDOX: If the court please, I took no demurrer to the declaration for the reason that the alleged breach of duty was claimed to be on the part of the agents and employés in charge of the train. If counsel desire to show that this gate-keeper was in the employ of the Washington & Georgetown Railroad Company, I do not object; if they want to show he was in the employ of the Baltimore & Potomac Railroad Company, that he had a duty to perform, and that he failed in that duty, thereby rendering the B. & P. Co. liable for this injury to the plaintiff for that breach of duty (which is not specifically declared), then I do object to this line of inquiry. I have no objection to their showing that he was the agent of the Washington & Georgetown Railroad Company, and I suppose my friend, Mr. Davidge, has none. There is no allegation as against the defendant steam-car company of a violation of duty on the part of this gateman.

Mr. DAVIDGE: I suppose the learned judge, in speaking of the two companies, refers to the Baltimore & Potomac and the Washington & Alexandria?

Mr. MADDOX: The Washington and Georgetown.

Mr. DAVIDGE: Oh, there is no pretense, your honor, that the street-car company had anything to do at all with those gates.

The COURT: I am only speaking of the allegation in the
92 declaration in relation to the servants of the companies "being negligent in the performance of their duty;" and then the

declaration specifically sets out in what respect they were negligent.

Mr. DAVIDGE: I beg your honor's pardon.

The COURT: I think that at this stage of the case that should not prevent the plaintiff from proving, if possible, whose servant the gate-keeper was.

Mr. DAVIDGE: I thought your honor might have in your mind—you recollect when I recall it to you—the evidence of Mr. Stevens touching the two companies, the Washington and Alexandria and the Baltimore and Potomac.

By Mr. COLBERT:

Q. You have testified that that gate-keeper who operated that gate was under the direction of the supervisor of tracks, I believe?

A. Yes, sir.

Q. What supervisor of tracks?

A. I do not quite understand your question.

Q. You said in response to a question which I put to you that the gate-keeper was not directly under your charge, but was under the supervisor of tracks.

A. Yes, sir.

Q. Do you mean the supervisor of tracks of the Baltimore & Potomac Railroad Company?

A. Yes, sir.

93 Mr. MADDOX: I object to that, if your honor please; I want to note an exception to that.

Mr. COLBERT: For what reason?

Mr. MADDOX: For the reason that you are not entitled under your declaration to prove that the gate-keeper was the agent of the Baltimore & Potomac Railroad Company.

The COURT: Of course you have a right to note an exception; I have already ruled upon that point.

To all of which questions tending to prove that the gate-keeper was the servant or under the control of the Baltimore & Potomac Railroad Company, at the time they were put and before they were answered, the defendant The Baltimore & Potomac Railroad Company, by its counsel, then and there objected, and upon the ground that there was no averment in the declaration that the gate-keeper was the servant of said company; that he had a duty to perform, and that he failed in that duty; but the court overruled the said objections and allowed the witness to answer the questions; to which rulings of the court the defendant The Baltimore & Potomac Railroad Company, by its counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

And thereupon, after the foregoing proceedings, which are hereby made part hereof, the witness proceeded to testify further on direct examination as follows:

94 That was the case on the 12th of August, 1889.

On cross-examination the witness further testified, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

Besides the Baltimore & Potomac Railroad Company the Richmond and Danville also used that track. I am not certain whether the Chesapeake & Ohio used it at the time. The Alexandria & Fredericksburg Company also used it.

Recalled for further cross-examination, the witness further testified as follows:

I do not know whether the gate-keeper was employed on the 12th of August, 1889, by the Alexandria & Washington or the Alexandria & Fredericksburg or the Baltimore & Potomac Railroad Company.

On redirect examination the witness further testified as follows:

These roads are practically under the same management, but are entirely different corporations.

On further cross-examination, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, the witness further testified as follows:

These railroads were under the management of the officers of the Baltimore & Potomac and the Alexandria & Fredericksburg
95 and the Washington Southern. The same officers managed the three companies. I do not know by which one of these three companies the gateman was employed.

Thereupon the plaintiffs further gave testimony by one GEORGE T. DUNLOP, who testified on direct examination as follows:

I am the vice-president of the Washington & Georgetown Railroad Company and acting president during the absence of Mr. Hurt. The Washington & Georgetown Railroad Company has no connection that I know of with the gates erected at the corner of Seventh street and Maryland avenue southwest, in this city.

Thereupon counsel for the plaintiffs announced that they had no more testimony to offer, and the foregoing was all the testimony offered or given by the plaintiffs.

Thereupon counsel for the defendant The Baltimore & Potomac Railroad Company moved the court to instruct the jury to return a verdict for said defendant, but the court overruled said motion and refused to so instruct the jury; to which ruling of the court the defendant The Baltimore & Potomac Railroad Company, by its counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

And thereupon the defendant The Washington & George-
96 town Railroad Company, by its counsel, moved the court to return a verdict for said defendant, but the court overruled the said motion and refused to so instruct the jury; to which ruling

of the court the defendant The Washington & Georgetown Railroad Company, by its counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

And thereupon, after the foregoing proceedings, which are hereby made a part hereof, the defendants, to maintain the issues on their part joined, offered and gave evidence as follows:

By C. I. TIERS, who testified on direct examination, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

I am assistant supervisor of the Baltimore & Potomac Railroad Company, and have recently made a map of the location of the tracks and their arrangement down about Seventh street; it shows such arrangement as far east as Four-and-a-half street and as far west as Ninth street. It is about 550 feet from Ninth street to Seventh and 600 feet from Seventh to Sixth. It is 52 feet from the middle of the Belt Line tracks to the steam-car track at Seventh street. It is about 45 feet from the north building line of C street to the center of the Belt Line car tracks. It is between 38
97 and 40 feet from the watchman's box to the north intersection of the street-car track and the steam-car track. It is 140 feet from the south steam-car track on Maryland avenue to the north steam-car track on Virginia avenue by way of Seventh street. There are four tracks on Virginia avenue between 4½ street and Sixth street. There is a single track on Maryland avenue between Sixth and Eight- streets. It is twelve and a half feet between the gates.

The map spoken of by the witness is here offered in evidence.

On cross-examination the witness said that — a supervisor of the Baltimore and Potomac railroad he has charge of this single track.

And thereupon the defendants further gave evidence by one WILLIAM A. HARDING, who testified on direct examination, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

I was driver of the street car on the morning of August 12, 1889, when this accident happened to Mrs. Hickey; it was an open car. There were from 70 to 80 people on it. They were sitting and standing on the running boards along the sides and on the front and rear platforms. If I am not mistaken, the seats do not hold more than 36 to 40 passengers and they were all occupied. I have no recollection of stopping at C street or anywhere
98 along there until after we crossed Maryland-avenue track. I then stopped between the crossings because the bell was given to me to stop. I was employed as an extra. That morning I had what we call a "swing"—that is, running five trips in the morning and five at night. As I approached the crossing that morning the train of cars, to the best of my recollection, was be-

tween Eight- and Ninth streets, going 10 or 12 miles an hour. When I crossed the steam-car tracks the gates were up. I was then going at the rate of four and a half or five miles, which was generally considered the regular rate of speed for street cars. I did not see any of the commotion on the car because I was in front and this happened behind me. I had a good many passengers standing around me, such as gentlemen with baskets and one thing or another, on the dash; there were ladies on the car. I have a very indistinct recollection of the accident; it happened so long ago. I remember a lady jumping off or falling off, I do not know which. I do not remember that there was any commotion on the front platform where I was. After we crossed the steam-car track some one hollered. I though- at first it was a lot of children hollering, but afterwards found out that some one had fell off or jumped off the car. There was no commotion after that. I had a couple of regular railroad horses, pretty well broken. I do not re-
99 member that they were in any way skittish or frightened or anything of that kind. I did not put on the breaks that morning until I got the bell. I suppose I was then 15 feet south of the Maryland-avenue track. It is impossible with a load of that kind to stop under 10 feet, after putting the break on; the car will slide some. I did not put the break on between C street and where I stopped south of Maryland avenue. I was going at my regular rate of speed. There was no stopping of my car on the line of the steam-car tracks. The draught or rise on the horses might have slackened them up a little bit. There is a little pinch there when you strike that crossing. I mean a little upgrade from C street towards Maryland avenue. No one jumped off the front platform to my knowledge.

On cross-examination the witness testified as follows:

I have not much recollection about the occurrence of that that day, but I remember the accident. The seats were across the car. From the benches there are uprights or standards; I think in the center of the seat. There is a handle on these standar-s and the seats turn on these standards. I observed that the gates were up that morning. They were lowered after I went across. I know that by the bells in the gate. I
100 did not see them lowered; there was no lowering in front of me. I did not see the gate come down in the rear at all. As a general rule, of course, I always watch the track; it is not my business to watch the gates as much as the tracks, because I have been driving for the past three or four years over the Baltimore & Ohio at H street all day long, back and forth, and of course it becomes natural to watch. I looked and saw they were not down that morning, because I did not slack my speed at all. After I saw they were not down I did not watch the gates. I saw the engine between Eight- and Ninth streets coming around the curve. I suppose it is 350 to 400 feet from Eight- to Ninth streets. To the best of my judgment the train was coming 10 or 12 miles an hour; it was not going so very fast. When I saw the train at the curve I

was going across the Belt Line track. The Belt Line track is 35 or 40 feet from the steam-car track; it might be 50 feet. I did not think I would have to go pretty fast to get across before the steam car came down upon me. I got across safe. I have no recollection of whipping up my horses. I just kept along the regular rate. I do not know that I saw the gateman at the gate. I think that probably he might have been there, because in the summer time he was always sitting out there underneath the tree. I won't say always, but he was sitting out there. I do not remember seeing him put down the gates that morning, but I have so little recollec-
101 tion about the matter that I cannot say. I know the gates were not lowered, because I never stopped the car at all. I remember that much. I do not think I whipped the horses, but I am not positive about that. When I got to the building line of C street I could have seen an engine coming from the west. I do not know that I looked. I could see as far west as Ninth street. I did not see the engine before I got on the Belt Line tracks. I did not think the train coming at the rate of speed I thought it was coming pretty close to me. I had gone across there many a time the same way—that is, I mean the distance of the train being about the same. Sometimes the gate-keeper begins to put down the gates when the train reaches Ninth street, and sometimes he did not. I have known them to come half way down between Seventh and Eight- streets before they put the gates down. The gate-keeper might sometimes be in the box and not get out in time. I could not say where the steam car was this morning when they began putting down the gates. He did not put them down until after I went across. I suppose he made the effort to put them down as I was going across. The train was between Eight- and Ninth streets when I was crossing the Belt Line tracks. I got across the *the* steam-car tracks and stopped 15 feet away by the time the train came by. The gates were coming down as I crossed the track. I did not see them, but I knew they were coming down by the bell. Whether they came all the way down or not I do not know; I did not look back. I did not make an
102 effort to hurry up. I wanted to get through before the gates came down. I should judge it would be from 300 to 350 feet from Eight- to Seventh street. I do not know that it is less than 300 feet. I said there was a commotion in the car when I was crossing the steam-car tracks. I heard something like children hollering. I did not turn around to see what happened. I did not see anybody jump off the car or pushed off. I did not hear any commotion among the grown people; it sounded like children. Of course I suppose there were some women hollering. I did not know what they were hollering about. I did not know what it was, unless it was they saw the train coming. I did not see any danger at all. I had then been driving for two years and six months before that time on the Columbia railway. I am now watchman on the Columbia road. I continued to drive after that for the Washington & Georgetown Railroad Company until the early part of the following November.

On redirect examination, in response to questions propounded by the counsel for the Washington & Georgetown Rail- Company, the witness further testified as follows:

I was about the center of the Belt Line car tracks, to the best of my judgment, when I first saw the steam train coming. I had no doubt of my ability to get over the Maryland-avenue track in safety, and I did get over. When I first saw the steam train I cannot remember distinctly whether it was nearer Ninth street or
103 nearer Eight- street. Of course I do not know at what rate of speed the train was coming, but I thought it was 10 or 12 miles an hour. It might not have been so much. It was not going at an unusual rate; it was going just as I have seen it go before.

On recross-examination the witness further testified as follows:

When I was crossing the Belt Line car tracks I must have thought whether it was safe or dangerous for me to cross the steam-car track. I did not see any danger. I had no doubt I could get across without any danger. I did not say I stopped to think the matter over. I suppose I had the same mind as all of us have. I do not know that I had any more thought about it at that time than at any other. I saw that the train was between Eight- and Ninth streets coming around the curve. I thought the curve was nearer to Eight- street than to Ninth. The conductor took the statements of the witnesses.

In response to questions propounded by a juror the witness testified as follows:

The passengers that morning were going on a picnic, as far as I could tell. I do not think I was behind time. I do not think I was driving faster than usual; the only thing was we were running on a close street, if I am not mistaken. I did not stop the car on the railroad track. I did not make any pause there at all.
104 I did not make any effort to stop with the brake at all. To my recollection, the gates did not come down on the hips of the horses. I think I saw the gateman. I kept right on through until I got the bell to stop. I do not know whether I was entirely across the track before I heard the screaming behind me. I never took the trouble to find out where the commotion was. I did not know at the time exactly where it was, whether it was on the crossing or whether I had crossed when the screaming was going on. I cannot say.

Thereupon the defendants further gave evidence by one JOHN E. BROWN, who, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, testified on direct examination as follows:

I am now in the grocery business at 19th street and Pennsylvania avenue. In August, 1889, I was a conductor on the Seventh Street line, in the employ of the Washington & Georgetown Railroad Company. I was conductor of the car when this accident happened.

I did not see Mrs. Hickey that morning until after the accident. I did not know anything about it until it was over. After the car crossed Maryland avenue some one said that a lady had jumped off, and then I looked back and saw two gentlemen carrying a lady. This was after we had crossed the steam-car track. I had not noticed any commotion prior to that time. When I heard this call I was — running board on the west side, collecting fares. I did not see the railroad engine. I do not think I ran the bell for the
105 driver to stop. I have no recollection of ringing the bell. I do not think I blew a whistle. I did not notice the gates. To the best of my knowledge, the street car stopped 10 or 12 feet south of the railroad tracks. I think it stopped because some one rang the bell, but I am not positive about that. I did not see Mrs. Hickey get off the car.

On cross-examination the witness further testified as follows:

The car was pretty well crowded. All the seats were occupied and the standing room pretty well taken up. It took me from Pennsylvania avenue down to this point to collect the fares. I do not think I had finished when I got there. I was taking an excursion party down to the river, I suppose. I thought they were going down there, but of course I did not know it. It had all the indications of an excursion—baskets and things of that sort. I was not behind time — I know of, and was not endeavoring to make any particular time to catch the boat. I was not delayed for any length of time that I know of in taking on passengers. I cannot remember how many passengers I took on at the avenue. I did not notice that the car was going faster than usual, and I do not remember stopping between Pennsylvania avenue and Maryland avenue. The first stop the car made was when it had cleared the gates and was 10 or 12 feet past the tracks. I did not see the
106 steam car coming or look for it. I was on the side of the car towards the Long bridge. I never noticed we were coming near the crossing; I paid no attention to that; very seldom did. I did not hear any commotion or screaming, or anything of that sort. There was nothing to indicate or call my attention to the fact that we were approaching the crossing. I noticed no standing up in the car. Everything was just as usual, as far as I remember. I do not know why the car stopped, unless some one on the back platform pulled the bell. That was the first I knew that there had been any accident whatever. Just at that time some one hollered that a lady had jumped off. I think the bell was pulled just after we got across the track, but I would not say positively about that. I did not see the gateman there or see him lower the gates. The gates were down after we had crossed. I did not see them coming down and did not know how long they had been down. I did not see Mrs. Hickey get off the car, and do not know how she got off. I went back afterwards to see after her, but did not notice the condition in which she was. I have been in the grocery business three years. After this accident I was a conductor for the Washington & Georgetown Railroad Company about nine months.

On redirect examination, in response to questions propounded by the counsel for the Washington & Georgetown Railroad Company, the witness further testified as follows:

I did not notice the gates. I do not know whether they were coming down or not. I do not remember of their coming
107 down on the car. If they had done so I would have known it, I should think. I do not know that I would have known that the south gate came down ahead of the horses, because I was back near the rear of the car. If they had come down on the horses and the car had stopped, I think I should have recollected it.

On further redirect examination, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, the witness stated that the car did not slow up, to his knowledge, until it crossed the Maryland-avenue track.

In response to questions propounded by a juror the witness testified as follows:

I went back to see whether the lady was hurt or not. Some one said that a lady had jumped off the car, and I went back as soon as I had stopped the car. I got some names of witnesses on the car. It was always a rule of the company when an accident happens to get the names of people on the car. I asked some one to stay behind and look after the lady because I did not want to leave her by herself. I did not hear any one say why she had jumped off the car. There was no commotion at all, that I know of. I should think I would have known it if there had been. I do not say that the witnesses are wrong in testifying here that there was a great
108 deal of commotion on the car; I say I do not remember it. I do not have any recollection of any commotion at all; I did not see five or six persons jump off the car. The car did not stop, to my knowledge, on the railroad track.

Thereupon the defendants further gave evidence by one ROBERT STONE, who testified upon direct examination, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

I am working at the Long bridge. In August, 1889, I was tending gates at Seventh street and Maryland avenue. In the summer time I would sit out under the tree right by the telegraph pole. This is one step from the cranks that work the gates. I sat there because it was coller. I generally started to lower the gates when the train was coming at Ninth street and when it came around the curve at Sixth street. It took about 30 seconds, I guess, to lower the gates. There were three bells connected with the apparatus for lowering the gates. They worked with a spring, and as the crank turns the bells ring. There were two cranks, one for the north gate and one for the south gate. The local train was coming in, due at the depot at half past nine. I was watching for her, sitting under the tree out by the telegraph pole. When I saw her coming up by

Ninth street I started to lower the gates down. We had to watch the street and pavement and for vehicles; other vehicles be-
109 sides the street cars. I watched to see if there was any one under the fall-backs; there were fall-backs on the gates then. I started to lower the gates, and I happened to look around and this summer car was coming with a big crowd of people on it. I saw that he was coming right under the gates, and I raised the gates up again and the street car passed through. The steam-engine was then a little west of Eight- street; just about Eight- street. The north gate had hardly come down to the horses' manes when they were raised right up again. The north gate came near touching the horses. The horses' feet might have been on the north track, maybe, or somewhere close to it, because the track is only four feet wide. The gates were at least about three feet outside of the track. When I lowered the gates I raised them up again quickly, because the horses were underneath it. They did not stop. They kept on through. I raised the gates up immediately. I did not want them to stop because the horses would have been on the track, and having come that far I raised the gates to let them through. I looked around and saw that the steam car was up at Eight- street, a little west of it, between Eight- and Ninth. It was coming at a slow rate. The gates were made of three-quarters-inch white pine, and anybody running against them with a light buggy or a bicycle would break them. They would not have stopped the car at all. They would have broken all to pieces. After I raised the gates to let the car through I lowered it again as soon as the car passed. I did not see any of the commotion. I heard
110 some hollering, but I could not tell what it was. They were standing up on the west side of the street car very thick. The car seemed to be pretty crowded. I did not see the lady get off, because there was a big crowd on the west side of the car. You could not see anything. I saw her after the train passed through the gates, between the street-car track and the Belt Line tracks—half way between the two tracks. Two gentlemen had her, and one a hold of each arm, as well as I recollect; one was a light-colored man with a blue uniform on. I do not know at what point she struck the ground. I did not hear any noise or commotion as the car passed. I judge there were about 70 or 80 people on the street car. There is not a great deal of labor in lowering or raising the gates. A ten-year-old boy could have raised the gates that were there without any trouble at all. The gates then were lighter than the gates now. They were then set out by the curbstone, outside of the curbstone, and the gates there now set west of the pavement. In the old days the sidewalk was protected by a fall-back from the gates—what we call arms; they fell across the pavement. The- all worked together as these cranks were turned. The fall-backs fell down over the pavement and the gates went over the street. We had to look out for the pavements as well as the street, to see that nobody was under the fall-backs on the pavements. There was nothing that passed by there that morning except a wagon, which passed
111 just a short while before the street car; it was going north.

A very short time after this wagon passed I began to lower the gates.

On cross-examination the witness further testified as follows:

The steam car was about Ninth street that morning when I began to lower the gates. The street car was coming down Seventh street, right close to the gates, the horses trotting pretty fast—about as they usually run. They always went down there right fast. The horses' heads came up under the gates before I could get them down. The car was coming close to the gates when I began to put them down. It takes about 30 seconds to lower the gates. I do not think I could do it in 10. I did not see the street car until it was right close up to the gate. The horse-' heads were coming right up under the gate. I could not get the gates down before they had passed under. I saw it before it got to the gates, but the gates did not touch the horses. They came down somewhere about the manes. The street car was right close to the gates when I began to lower them. I reckon it takes from 20 to 25 seconds to lower the gates. I could not say exactly. I never timed myself in putting the gates down. I could not say just how far the street car had moved between the time I began putting the gates down until it almost touched the horses' manes; I suppose 15 feet. I do not
112 know that it would take a street car 30 seconds to travel 15 feet. The steam car was about Ninth street when the gates came down almost to the horses' manes. I do not know whether the driver saw the gates coming down. He could have seen it. The street car did not slow up any, as I recollect. It came right on while I was lowering the gates, so that when the gates were nearly down to the level of the horses' manes the horses' heads were under it. I did not want the horse car to stop across the track. There would not have been a collision if it had stopped, I guess. The steam car was coming, but they could have stopped the steam cars. I suppose they would have stopped if the street car had got across the track. I did not hear much hollering. I heard some immediately when the car went through the gates—when the car was over the track. I did not know what the cause of it was. It did not occur to me that it was because the gates were coming down and the steam cars coming. I did not see any cause for anybody to make any fuss. I did not see the street car until it was 10 or 12 feet from the gates. I had to look out for people on the pavement and for the trains and for the street. I could not keep my eyes around me all the time.

On redirect examination the witness further testified, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

When the gates are completely lowered there are about
113 four feet from the ground. When I began to lower the gates the street car was about half way between the Belt Line tracks and the steam-car tracks. There is very little difference in

the time it takes to raise and lower the gates. I guess you could put them up in nearly about the same time as you could put them down.

On further re-direct examination, in response to questions propounded by the counsel for the Washington & Georgetown Railroad Company, the witness further testified as follows:

The height of the horses'-mane- is about six feet, I guess. I only know the gates did not come down on the horses' manes. I am almost certain that they did not come on the horses, but came very near it. I then raised them up immediately. I saw the train was up between Eight- and Ninth streets and I raised the gates up a little and the street car came through.

On recross-examination the witness further testified as follows:

When I started to lower the gates I thought I could get them down before the horses got to the steam-railroad tracks. I first saw the street car between the steam-car track and the Belt Line tracks. After the horses got under the gates I did not continue to lower them. I could not stop them from coming under the
114 gates. The horses were 10 or 12 feet north of the steam-car tracks when I first noticed them. I was just lowering the gates. The horses came right on under that gate and then, of course, I stopped lowering the gates and raised them up. I did not attempt to lower the gates after the horses got under them.

And thereupon the defendants further gave evidence by one FRANCIS T. BOWLER, who, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, testified on direct examination as follows:

I am a locomotive engineer, and have been for 17 or 17 years in the employ of the Baltimore & Potomac, the Alexandria & Fredericksburg, and the Philadelphia, Wilmington & Baltimore Railroad Companies. In 1889 I was employed by the Baltimore & Potomac Railroad Company. In August of that year I was running on the Southern division and between here and Alexandria. I was running engine No. 309. I remember an accident happening to a street car at Seventh street in August, 1889—that is, I remember some one got hurt on the street car or about a street car. I was that morning running the Alexandria local, due here at 9.30; I was on time and running between 5 and 6 miles an hour. I get at that from judgment and measurements together. Running at that rate of speed I could have stopped the train in 15 or 20 feet by the application of air brakes; they are worked by me from the inside of the engine, right by my hand, and are applied to
115 every wheel under the train, uncluding the driving wheel of the engine. When I was about Ninth street I noticed that there was some little excitement at the Seventh-street crossing. I do not know what was the occasion. I made mention of it to my fireman, and I said, "What is the trouble at Seventh street?" I

saw some people standing around there; more than usual. Of course, when I got down closer to Seventh street, along between Seventh and Eight-, I had a still better view of the circumstances. I saw some one, as I supposed, who was hurt being carried from the Seventh-street crossing towards the northeast corner of Seventh and Maryland avenue, or rather it would be Seventh and C streets. I then lessened my rate of speed. I passed over Seventh street at about three miles an hour; not more than that. There was no horse car there. I was on the north side, running the engine; I was looking forward; that was what we term a "double-ended engine;" it is provided with a head-light and pilot on both ends, and of course the position for the engineer would be on the right side of the engine going south and the left side of the engine going north because it runs backwards coming north. I was on the north side of the engine on all occasions going to and coming from Alexandria. When I crossed Seventh street I did not see any street car; I did not see any lowering of the gates or any gates coming down; no horse car passed in front of me. When the train passed Seventh street the lady was over about the Belt Line car tracks. I did not take any particular observation of it because I did not consider it concerned me a particle.

116 On cross-examination the witness further testified as follows:

I saw some little excitement when we were up about Ninth street. I saw some 5 or 6 or probably some 7 or 8 people standing right close to the crossing. I thought it was something unusual, and from that time I did not notice any street car pass. I have no knowledge whatever of the fact about which the witnesses were testifying. I am only telling you what I know. I saw no street car pass after I crossed Ninth street. There was no street car that passed the steam-car track after I passed over Ninth street; I am positive about that.

And thereupon the defendants further gave evidence by one W. H. BAILEY, who, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, testified on direct examination as follows:

I am a locomotive engineer, and have been since October, 1891. In 1889 I was a locomotive fireman, associated with Mr. Bowler. I remember something about the accident that happened at the Seventh-street crossing on August 12, 1889. I was on the engine that morning, on the south side. When we were at Ninth street I saw an unusual gathering around the Seventh-street crossing. We came on down near Eight- street and a street car crossed over next to Virginia avenue, between Virginia avenue and C street—that is, between the south gate of the Maryland Avenue line and the
117 Virginia-avenue track. Then I crossed over to the engineer's side and saw who was hurt, and I saw two gentlemen carrying a lady towards the northeast corner of Maryland avenue and Seventh street. To the best of my knowledge, she was near the Belt

Line track when we passed over Seventh street. We were going from 5 to six miles an hour. We crossed Seventh street going not over three or three and a half miles an hour. Just as the engine passed the Ninth-street crossing I saw the street car near the south gate of Maryland avenue; we were then not far from the Ninth-street crossing. When I first saw the horse car it was between the Virginia-avenue tracks and the south gate of the Maryland-avenue tracks. It had then stopped. It was across the Maryland-avenue track; right near to it.

On cross-examination the witness further testified as follows:

The street car had passed the north track when I first saw it from up Ninth street. It had then crossed to the north of the railroad track. We were then two squares away.

And thereupon the defendants further gave evidence by one AUGUSTUS DE GRUMMOND, who, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, testified on direct examination as follows:

I live at No. 639 Maryland avenue, and have lived there for about eleven years; I am eighteen years old, and am employed by
118 the Adams Express Company. On the morning of this accident I was on my way down Seventh street, going home, and as I was going around the corner, the northeast corner of Seventh street and Maryland avenue, almost at the corner, the Seventh-street car was crossing the Belt Line track and the gate started down. I saw the gate start down in front of the car, but I do not know whether it hit the horses or how far it came. I know it went right up again and the car passed through and I rushed over there and saw the lady on the ground. The gentlemen run around and picked her up. I saw her foot; it looked like it had been broken; it did not look as if it had been run over. The street car was crossing the Belt Line car tracks when these gates began to run down. The steam engine wa- then about midway between Eight- and Ninth streets, coming, I judge, about six or seven miles an hour. I first saw the lady that was injured when I rushed over to the crowd. She was then on the ground. She was on the north side of the steam-car track. The gates were coming down in front of the street car. As soon as the gateman put the gate down he raised it right up again. The car glided by and the gate came down behind the car. As the horses approached this gate was coming down. The street car slacked up, but did not stop.

On cross-examination the witness further testified as follows:

The street car slackened up as it approached the gate; it
119 had not then reached the gate. By slackening up I mean it looked like they were trying to stop. The driver's horses were under the gates before he had time to stop; then the gates went up and he went on again. It looked like he was trying to stop at the time. I should judge he had come to a fast walk before

the gates dropped. I was about 100 feet, I should say, from the track. I rushed over to where the lady was because I saw the crowd gathering; there was something of a commotion there. I did not notice whether any of them got out of the car. I should judge there were 10 or 12 people congregated just as soon as the car passed. There *would* a good many people going up Seventh street and a good many coming down, and after the car passed I noticed 10 or 12 people congregated at that spot. The steam cars had not passed at that time; they passed as I was going over. It was only a few seconds after the street car passed before the steam car passed. I started to run over as soon as I saw the street car pass. I had almost gotten over there when the train passed. I was on a trot. I saw the lady's foot. She was on the ground when I got there and some gentlemen were picking her up. The gentlemen were picking her up after the train passed. She was not standing up or being carried away when the train passed. I am positive they were just picking her up then. I saw the lady's foot; it looked as if it had been broken about the ankle. I could see blood running out and the bone, or what I supposed was the bone. I saw the skin was torn, because otherwise it would not bleed.
120 I did not see the skin; I saw the blood coming out. I should not think it would bleed unless the skin was torn. I think I saw the bone. I am not certain about it, but I saw a lump on the side of her foot or leg which I supposed to be the bone. I did not notice whether her stocking was broken or torn; it was full of blood; it did not look crushed. From what I saw I should judge it was broken, but not run over. I was thirteen years old when this accident occurred.

And thereupon the defendants further gave evidence by one BEVERLY BRYAN, who, in response to questions propounded by the counsel for the Baltimore & Potomac railroad, testified on direct examination as follows:

I live at No. 1250 20th street, in this city. I have lived here since 1872. My present business is a waiter at the Capitol. In 1889 I was running on the boat to Clifton beach, the T. V. Arrowsmith. I made the run every morning and generally went to the boat on the avenue line of horse cars. I was on the car the morning of the accident to Mrs. Hickey. I took the car at the Seventh Street car at the Pennsylvania junction and do not remember the street car stopping anywhere before the accident. I was sitting on the rear seat of the car, smoking. It was a summer car. Passengers are allowed to smoke on the first and second seats from the rear. I did not notice Mrs. Hickey until she jumped. She was in the third
121 seat ahead of me. I did not notice the gates. I was the second from the end on the seat I was sitting on. The commotion on the car occurred first after Mrs. Hickey jumped. She just jumped right up and right off. It was just after we crossed the Belt Line track. It might not have been more than two or three steps from the Belt line, probably, because she jumped up, and as she struck

the ground I caught the bell. I jumped up and caught the bell just as she struck the ground and tried to get up and went back again to the ground. I did not notice the gates. I did not see any steam-engine. I did not see anybody else jump or pushed from the car, but several persons stood up just after she jumped to look and see. They just stood up and did not get off. I stood up myself, and, in fact, got off or started to get off. Just as I went to catch the front of the seat where I was sitting I caught my hand and cut it so badly that when I got to Mrs. Hickey I said, "I am too bloody to take hold of you." I did not want to bloody her clothes all up and I did not touch her. I met the conductor coming running up and saying, "My God, somebody go back and help this lady," and the car was standing across the crossing. I got off the car on the north side of the steam-car tracks. I got off to see if she was hurt, like anybody else, not knowing whether she could help herself or not. I did not see the train anywhere. I did not see any. I did not stay long after I found
122 out that my hand where I caught it in the hinge, or whatever it was, was bleeding so very freely that I went right away from there and to a bar-room and got some rum and a rag from a man down Seventh street and done my hand up; then I got on a car—I do not know how many went past—and went on down to the boat. After the accident I came up Seventh street to where she was. I did not go in, though, there was such a big crowd, but I saw her through the glass. I did not see any woman sitting next to her who weighed 200 pounds and was six feet two inches high; I did not see any man like that. I did not see any man running down Maryland avenue afterwards; I did not see anything of that kind; everybody around where I was standing was seeming to go to where the lady was hurt. I was in the extreme seat of the car, and there was no hollering on the car until after the lady jumped.

On cross-examination the witness further testified as follows:

The lady jumped just after crossing the Belt Line car track. I know she jumped after crossing the Belt Line car track and before we got to the steam-car track; I thought it was about midway. I pulled the bell just after she struck the ground; I pulled the bell before the street car got to the steam-car track, but the car
123 did not stop until it was across. I pulled the bell and I saw other hands on the bell cord; whose they were I cannot say. I do not think the street car had much time to stop after I pulled the bell before it got to the steam-car tracks. I do not think it was quite 30 feet away; it might have been, but I was back in the rear. If it was 20 feet away maybe it could have stopped; I do not know. The street car was going about the usual rate, the horses on a trot. I did not see the gates coming down and I did not see the watchman, nor did I see the steam cars at that time; I did not see the train anywhere. The street car was crowded. There was only one seat between me and Mrs. Hickey. I do not know how many seats are in a car; I do not know whether or not Mrs. Hickey was in the

third seat from the driver, because I do not know how many seats there are in a car; but I know she was in the third seat from the rear end. I do not remember how she was dressed; it seemed to me she had on something black, but I am not sure about that; it was a warm day. I do not remember of her having on a white dress. I heard nothing before Mrs. Hickey jumped, only people talking in the car; there was no noise or screaming before that. There was no rushing in the car one way or another. I did not know that a steam car was coming down at all. I was sitting on the left-hand side going down, on the same side that Mrs.
124 Hickey jumped off. I do not know whether all the seats in her seat were occupied. I do not know whether a man or a woman was sitting next to her; I only know that there was one man on the car that I knew, in the seat that Mrs. Hickey was sitting on. He was a man that worked with me where I worked, at Clifton beach. I do not know whether he was sitting next to her or not, but he was sitting in that seat. I did not see her pushed off; I just saw her raise right up and jump right off. I do not know whether she was pushed off or not.

On redirect examination the witness, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, testified as follows:

No one was standing up in the seat where she was until she left the car. Then, of course, most everybody in the car jumped up and stood up and looked to know the cause. I myself stood up. The friend of mine on the seat with Mrs. Hickey was called "Tom." He ran the flying horses. I forget the rest of his name. His right name I never knew. I think he used to run the flying horses down there, and I used to go down with him every morning on the same boat.

On recross-examination the witness further testified as follows:

This Tommy was no friend of mine; he was a white man, sir. I do not know whether he had the flying horses, but he was around them taking up the money. When I saw Mrs. Hickey jump
125 I pulled the bell once immediately. I immediately proceeded to get out of the car. At the time she jumped I jumped right up and pulled the bell and looked around, and the conductor was on the west side of the car, about midway. I started to get off, but not until I got my hand out of the hinge. I got off before the street car reached the steam-car track. I was between the steam car and Mrs. Hickey when I got off. I had to go back to Mrs. Hickey. I met the conductor after he had gotten off and came around there. I do not know where he got off. I did not meet him coming back north. He was coming right towards Mrs. Hickey just as I got off the car and stood. I do not know whether he got off the car before it reached the steam-car track or not; I cannot say that. The conductor came right by me, you understand, with his hand in his pocket holding his money down. I did not mean to say that I did not know whether she was pushed off or whether she jumped off;

I saw her jump off. I did not see her pushed off. I said she jumped off. I told you I did not see any one push her off, I only saw her jump.

And thereupon the defendants further gave evidence by one GEORGE T. DUNLOP, who testified on direct examination, in response to questions propounded by the counsel for the Washington & Georgetown railroad, as follows:

Identifies photograph of the old horse cars running on Seventh street. Photograph offered in evidence. The iron
126 casting at the end of the seat is about twelve and a half inches across the top and fifteen inches at the base; that would make in six and a quarter inches on each side of the upright or the bolt hole through the arm. The height of this cast-iron arm is 17 inches; they are at the end of each seat. The seats turn over them. A summer car weighs 4,000 pounds. It is about 24 inches between the seats; the length of the car is 22 feet. There are 7 reversible seats. The opening on the floor line of the base is about 12 inches.

On cross-examination the witness further testified as follows:

I am certain it is not 30 inches between the seats. I never measured it, but, from the knowledge I have of cars, I think it is about 24 inches from the center of one post to the center of another. I have no other means of stating this positively except that I am perfectly familiar with the cars and have been in and about the shops almost daily. I do not remember that my attention was ever particularly called to the distance between the seats of cars, so I do not know the exact measurement. The iron casting is called the arm support; it is about 13 inches high. I gather this from my general information and familiarity with the cars; I never measured it. I never measured the length of the arm supports, which extend from 6 to 7½ inches on either side of the standard.
127 The uniform height of the arm supports is from 12 to 14 inches. The open space at the bottom between the seats is about 12 inches, enough for a person to get in and out easily. I do not know what the distance was at the crossing on Seventh street between the end of the rail of the steam-car track and the end of the rail of the Washington & Georgetown railroad track. The regulation speed of horse cars was 6 miles an hour. The time between cars, according to the schedule in force on Seventh street, as well as I remember, was 5 minutes—that is, a car would start every 5 minutes from the junction of Seventh street and Pennsylvania avenue.

And thereupon the defendants further gave evidence by one CARRIE CAMPBELL, who, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, testified on direct examination as follows:

I live at No. 127 10th street southeast, in this city, and have lived in Washington nearly 21 years. I remember a little about

this accident. I was on the car that morning; took it at Sixth street and the Avenue southeast and transferred at Seventh street. I was going on an excursion to Collingwood Beach. I was sitting about the third seat from the front. I do not remember seeing the gates at all as we approached Maryland avenue. When I noticed the steam car it seemed to be between Eight- and Ninth streets, as near as I can get at it. I did not see any commotion in the car until a lady there jumped or fell; I do not know which. I did not see any until then.
128 I saw her just as the car was going across the Maryland-avenue track, and when I first saw her she was lying on the ground. I am not sure, but I think she was dressed in black. I did not see any commotion at all in the car until I saw her lying on the ground on the left-hand side. I did not hear any screaming or hollering. The car stopped, it seemed to me, long enough to take the names of the people on the car. This was after it passed the steam-car track. I did not notice the steam car at all any more after I saw it between Eight- and Ninth streets.

On cross-examination the witness further testified as follows:

I was sitting in the extreme seat on the left-hand side of the car going down. The lady that fell was about two seats behind me. I did not see her until after she fell. I do not know how she got out, whether she fell or was pushed. I saw her lying on the ground by turning around a little. I was facing the river and was not looking behind me. I saw her kind of sideways. I do not know that any of the people were standing on the side of the car between me and Mrs. Hickey. There seemed to be a good many people on the car. I did not notice them standing on the running board. I think the street car was crossing the railroad track when Mrs. Hickey fell, but whether she was near the steam-car track or not I could
129 not tell. I do not remember anything about the gates. I saw the lady lying on the ground. I do not know whether she was out across the track or not. I do not think the street car stopped before I saw the lady on the ground. I am certain about that.. I do not think the car stopped until it stopped to take the names after the lady fell off or jumped off. I do not remember whether it stopped to take the names of the people before or after it got through the gates. The conductor took the names of the passengers. He did not take mine. I was summoned here. I do not know how they got my name. I gave it to a man whose name I do not know about four years ago. I saw the steam car between Eight- and Ninth streets. I do not know how far it is from Seventh to Eight-. I did not notice Eight- street particularly that morning. I say it was between Eight- and Ninth streets because it seemed to be so far off. I do not know how far it is between Seventh and Eight- streets or anything about the location down there. I do not know whether there is an alley or a small street between Seventh and Eight-. I say the car seemed to be between Eight- and Ninth streets because it seemed to be so far off. Eight- street is a square from Seventh. I do not know whether it is a long square

or a short one. When I noticed the steam car between Eight- and Ninth streets the conductor was taking the names of the people.

On redirect examination the witness testified, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

130 The commotion in the car was caused by the lady lying down on the ground. I did not do anything but sit still in the car. I did not stand up.

And thereupon the defendants further gave evidence by one CARRIE LIVINGSTON, who testified on direct examination, in response to questions propounded by the counsel for the Baltimore & Potomac Railroad Company, as follows:

I live at No. 1312 Seventh street; am married, and my husband's name is S. Livingston. During the year 1889 I frequently rode on the cars up and down Seventh street. I remember it because I had a little baby at that time—a little boy 12 or 13 months old. I used to take him down there every day. I was on the car on the morning of this accident, on the front seat—the seat facing the passengers. I was facing north. I did not notice the steam car as we approached Maryland-avenue track. I did not notice any commotion on the car. There was an excursion party going down and they all seemed to be jolly until we passed the track there, before we got to the Maryland-avenue track. I do not know what track it is; the street-car track this way. We passed that and I heard a lady scream, get up, and jump out; that was the first time there was any commotion in the car. After I saw the lady jump out I got up and asked what was the matter, and a gentleman sitting on this seat next to me said, "Just keep your seat; there is nothing the matter." I happened to turn around this way and I saw the gates coming down nearly to the horses' manes; it had not
131 touched the horses' manes and went up in a hurry, and we went through and stopped after we got through. I did not see any danger. I wanted to get off because I saw the lady jump and it scared me. I had a bad attack of nervous prostration nine years ago and of course it frightened me when she jumped. After the street car passed Maryland-avenue track and the car stopped for a few moments or so I noticed the steam car. I happened to look up then and saw the car coming, as I supposed, up about Ninth street; it was coming east. I was sitting with my back to the west. I did not hear anybody cry out in the car, but the lady who screamed jumped up and jumped out; she said, "My God!" and something, but I do not remember just the words; that was the first sign of a commotion I saw. It was an excursion party, with a lot of baskets, and a lot of ladies and children in the car. I had my little boy looking at the horses. The lady was sitting on the third or fourth seat from me, on the east side of the car. I was facing her; she was right in front of me. She jumped towards the east; the same side she was sitting on. I did not no-

tice the people sitting beside her. I did not see but two or three people get off, and after the car was coming down towards the south they seemed to be jumping around, and then they ran and caught the car again going towards South Washington. I did not see the big man, six feet and two inches high and weighing 200 pounds, running down Maryland avenue.

On cross-examination the witness further testified as follows:

132 The car was very crowded. People were standing on both sides and on the front and back platform-. The seats were all taken. There were some gentlemen standing on the side near Mrs. Hickey at the time. Before Mrs. Hickey jumped I was sitting there talking to a lady and had my little boy looking at the horses. A lady was sitting next to me. There was no commotion at all until the lady screamed and jumped out. Prior to that time I did not hear any hollering or anything of that sort. The street car did not stop. I asked a gentleman what was the matter. He said, "Just keep your seat," and I happened to turn around and I saw the gates there were very near the horses' manes, but they did not touch the horses' manes. It was an excursion party and all seemed to be in good cheer. Prior to that time the lady jumped out. I was facing to the north. I did not look towards the west before she jumped out. I did not see a train before she jumped out. I saw the engine after we passed the track; not before. I am certain the lady jumped out. I was sitting so close to her; I suppose closer than I am to this rail here. There were more than two rows of passengers between me and Mrs. Hickey. There must have been three or four. I could see all the passengers. I was sitting facing them. I was unable to see Mrs. Hickey because I was sitting there talking to a lady, and Mrs. Hickey gave a scream and jumped up and jumped out. I was not much excited at the time. I was a little nervous. I am of a nervous temper-ment. I started to jump off and would have jumped off, but not until the lady jumped off and screamed and some of
133 the passengers were excited. After she jumped off I turned towards the driver. After the lady jumped off I looked out this way and on both sides and I did not see any danger at all. After I saw Mrs. Hickey jump I turned and looked in the direction of the driver. I saw Mrs. Hickey after she was on the ground. I did not know what was the matter, but turned around and saw the gates coming down. I was then standing up, and while standing up I looked around and did not see anything the matter this way or that way. I was about to jump out and some man said, "There is nothing in the world the matter." The gates came down almost to the horses' manes, but it did not touch them. That did not impress me as anything dangerous. I then sat down and kept my seat. After the street car got across and had stopped, I noticed the steam cars coming up about Ninth street. On the seat with me there were some gentlemen and ladies and baskets and things and children. They were on their way down to the boat. I was going down as far as the boat, as I had done all the summer,

with the boy. I did not notice five or six men in uniform. There was a lady sitting next to me and I did not see anybody in uniform, but there was one gentleman, I think, on the other side. I thought he said he was the captain of some boat. The street car did not stop very long after it crossed Maryland-avenue tracks. The first I had seen of the train was after the street car stopped,
134 and it was then up about Ninth street, as far as I could see. I did not give my name to the conductor on that occasion. The conductor knew me, being that I lived on Seventh street. Passing the door very often, the conductor learned nearly all the faces that live on Seventh street.

And thereupon the defendants rested, and the foregoing was all the testimony given in behalf of the defendants.

No rebuttal testimony was offered, and thereupon the plaintiffs rested; and the foregoing is all the testimony that was offered or given at the trial by all or any of the parties.

And thereupon, after the foregoing proceedings, which are hereby made a part hereof, the court, at the instance and request of the plaintiffs, gave the jury the following instructions and each of them:

1. If the jury believe from all the evidence that on the 12th day of August, 1889, the plaintiff Margaret L. Hickey was a passenger on one of the cars of the defendant The Washington & Georgetown Railroad Company on Seventh street west, which car was approaching the steam-railroad track of the defendant The Baltimore & Potomac Railroad Company on Maryland avenue southwest, upon which a train of steam cars was approaching the point of junction from the west, and while said street car was approaching said point the agents of the said Washington & Georgetown Railroad Company so negligently and imprudently managed the said street car and the agents of the defendant The Baltimore & Potomac
135 Railroad Company engaged in running the said train of steam cars and the gate-keeper operating the gates at the crossing, if the jury believe from the evidence that he was an employé and agent of the Baltimore & Potomac Railroad Company, so negligently and imprudently managed said gates that the passengers in said street car were under a reasonable apprehension that a collision between said street car and said train of steam cars was imminent and that in a reasonable effort to avoid injury from said collision the said Margaret L. Hickey jumped from said car or through the conduct or efforts of some other passenger or passengers in said car, acting in a reasonable apprehension of an approaching collision in endeavoring to avoid injury from such collision, was pushed and shoved from said street car and was thereby thrown to the ground, sustaining the injuries for which this suit is brought, then the verdict of the jury should be in favor of the plaintiffs and against both defendants, even though the jury should believe that had the plaintiff Margaret L. Hickey remained or have been allowed to remain in said street car she would have in fact avoided any injury.

2. If the jury believe from all the evidence that on the 12th day of August, 1889, the plaintiff Margaret L. Hickey was a passenger on one of the cars of the defendant The Washington & Georgetown Railroad Company going south on Seventh street near the
136 junction of the tracks of said company with the track on Maryland avenue of the Baltimore & Potomac Railroad Company, and while in said car and while in the exercise of due care and prudence the engine and cars of a train of the Baltimore & Potomac Railroad Company, which was approaching the point of junction from the west, was so carelessly and negligently managed by the engineer and persons in charge thereof and that the gatekeeper operating the gates at the crossing, if the jury believe that he was an employé and agent of the said Baltimore & Potomac Railroad Company, so negligently managed the said gates at said time that as said street car and said train of steam cars approached each other the plaintiff Margaret and other passengers in said street car were under a reasonable apprehension that a collision was imminent and the said Margaret jumped off said car in a reasonable effort to avoid injury from such collision or was pushed or thrown from said car by some other passenger or passengers endeavoring in a reasonable manner to avoid injury from such collision, and the plaintiff Margaret was thereby injured, then the plaintiffs are entitled to recover against the defendant The Baltimore & Potomac Railroad Company, even though the jury believe from the evidence that by remaining or being allowed to remain in said street car the said plaintiff Margaret would, in fact, have avoided injury.

3. If the jury believe from all the evidence that the plaintiff Margaret L. Hickey on August 12, 1889, was a passenger on one of the cars of the Washington & Georgetown Railroad Company going south on Seventh street near the junction of the tracks of
137 said company with the track on Maryland avenue of the defendant The Baltimore & Potomac Railroad Company, and while in said car and while in the exercise of due care and prudence through the negligence of the driver of said street car said car was so managed and driven towards and upon said steam track as a train of steam cars thereon was approaching from the west that the plaintiff Margaret and other passengers in said street car were under a reasonable apprehension that a collision was imminent, and while under such apprehension and in a reasonable manner the plaintiff Margaret jumped from the car in an effort to avoid danger from such collision or was pushed and thrown from said car by some other passenger or passengers on said street car, likewise under a reasonable apprehension of an impending collision and in a reasonable endeavor to avoid the same, and thereby the plaintiff Margaret was injured, then the plaintiffs are entitled to recover against the defendant The Washington & Georgetown Railroad Company even tho' the jury may believe that if the plaintiff Margaret had remained or been allowed to remain in the car she would not, in fact, have been injured.

4. If the jury find from all the evidence that the plaintiffs are en-

titled to recover in this action, then they shall award such damages within the limits of the sum claimed in the declaration as will fairly and reasonably compensate the plaintiff Margaret for the pain and suffering caused to her by the injury which she sustained and for
the injury to her bodily health and power of locomotion, if
138 any such they find, which she has sustained in the past and
will continue to sustain in the future as a natural consequence of said injury and for such internal injuries and impairment to her physical health as they may find to be established by the evidence.

5. The jury are instructed that if they find from all the evidence that the plaintiffs are entitled to recover they may find a verdict against both the defendants or against one and not against the other, as they may find the liability of both or only one of the defendants from the evidence.

To each of which instructions at the time it was requested and before it was given the defendants and each of them, by their counsel, severally objected, and upon the overruling of such objections and to the giving of each of said instructions the defendants and each of them, by their counsel, severally then and there excepted and prayed the court to note the same upon its minutes, which was done.

And thereupon, after the foregoing proceedings, which are hereby made part hereof, the defendant The Baltimore & Potomac Railroad Company, by its counsel, requested the court to give the jury the following instructions and each of them:

½. Under the pleadings and evidence in this cause the plaintiffs are not entitled to recover against the defendant The Baltimore & Potomac Railroad Company and their verdict must be for said defendant.

1. Under the pleadings in this cause the plaintiffs are not
139 entitled to recover for any negligence, if any, on the part of
the employés of the defendant The Baltimore & Potomac Railroad Company in respect of the rate of speed of its steam train approaching Seventh street from the west at or about the time of the accident to the female plaintiff.

2. Unless the jury believe from the evidence that the train of cars approaching Seventh street from the west on the tracks of the defendant The Baltimore & Potomac Railroad Company just prior to the accident to the female plaintiff was going at a greater rate of speed than twelve miles an hour, then there is no evidence in the cause from which the jury can find that the persons in charge of said train were negligent or careless in the discharge of their duty to the female plaintiff.

3. Under the issues joined in this case the plaintiffs are not entitled to recover for any injuries to the female plaintiff caused by the negligence of the gate-keeper.

4. If the jury believe from the evidence that the gate-keeper started and was proceeding to lower the gates in time to let them completely down before the train approaching from the west reached Seventh street, then said gate-keeper was not negligent in the dis-

charge of his duty, even though they should further believe from the evidence that the driver of the street car in which the female plaintiff was riding did not stop his car before proceeding underneath the descending gates partly across the tracks of the
140 defendant The Baltimore & Potomac Railroad Company.

4½. If the jury believe from the verdict that just before the accident to the female plaintiff the gate-keeper started and was proceeding to lower the gates in time to let them completely down before the train approaching from the west reached Seventh street, and with reasonable and proper regard for the rights and safety of persons and vehicles using said street, then said gate-keeper was not negligent in the discharge of his duty, even though they should further find from the evidence that the driver of the street car in which the female plaintiff was riding did not stop his car before proceeding underneath the descending gates partly across the tracks of the defendant The Baltimore & Potomac Railroad Company.

5. It was the duty of the driver of the street car in which the plaintiff was riding, before attempting to cross the tracks of the defendant The Baltimore & Potomac Railroad Company, to look carefully to see whether the gates were descending and that no train was approaching near enough to cause injury to the passengers in his car or to excite apprehension of a collision in the minds of the passengers, and if the jury find that the said driver, without using these precautions, drove his car underneath the descending gates (if the jury find the gates were descending as the street car approached and in time to be completely lowered before the arrival at Seventh street of the steam train approaching from the west), thereby causing commotion on the car, in consequence of
141 which the female plaintiff was injured, then such injury must be attributed to the negligence of said driver, and not to any neglect of duty on the part of the gate-keeper, and the verdict must be for the defendant The Baltimore & Potomac Railroad Company, unless the jury should further find that said train was being negligently run or its speed greater than twelve miles an hour.

6. If the jury believe from the evidence that the rush of passengers and consequent confusion alleged, which led to the plaintiff being pushed or shoved from the car, as alleged, was caused by the driver of the Washington & Georgetown Railway Company proceeding with his car underneath the descending gates erected for the purpose of preventing danger to vehicles and foot passengers, and that his so doing was an act of negligence on his part, and that the gate-keeper, then in the act of lowering the gates, did not know and had no reason to believe that the driver would not stop his car before reaching said steam-car tracks, then the Baltimore & Potomac Railroad Company is not responsible for such negligence. It is not responsible for the negligence of the said driver, and was not called upon to anticipate such negligence.

7. Unless the jury believe from the evidence that the injury to the female plaintiff was caused by her being pushed or shoved from her seat in the car in which she was riding, as alleged in the decla-

ration, then the plaintiffs are not entitled to recover under
142 the issues joined in this cause in respect of any injury sustained by her.

8. If the jury believe from the evidence that the female plaintiff voluntarily jumped from the car in which she was riding, as testified to by witnesses in behalf of the defendants, the plaintiffs are not entitled to recover under the issues joined in this cause.

9. In this action the plaintiffs are not entitled to recover for medical or other attendance or expenses, nor for loss of time in consequence of the injury sustained, nor for the loss to the male plaintiff of the services of society of his wife.

10. Unless the jury believe from the evidence that the foot of the female plaintiff was run over by a wheel of the street car in which she was riding, then the plaintiffs are not entitled to recover under the issues joined in this cause for any injuries sustained to the foot of the female plaintiff.

And thereupon, the court gave said instructions numbered 1 and 9, but refused to give the other of said instructions numbered, respectively, ½, 2, 3, 4, 4½, 5, 6, 7, 8, & 10 or any of them; to which refusal of the court, in each instance, the defendant The Baltimore & Potomac Railroad Company, by its counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

And thereupon, after the foregoing proceedings, which are hereby made part hereof, the defendant The Washington & George-
143 town Railroad Company, by its counsel, requested the court to give the jury the following instructions and each of them:

1. The declaration in this cause charges the duty of the defendants, which is the predicate of the negligence complained of, as follows: "So to conduct and manage the said street car and the said train of steam cars as to avoid danger to the passengers in said street car," and then proceeds to aver specifically the breaches of the alleged duty whereby the injury complained of was sustained. The jury are instructed that the negligence charged against the defendants consist in the breaches of duty specifically alleged, and that they are not at liberty in this action to consider any other negligence.

2. While each defendant was bound to avoid danger to the passengers in the street car, neither of the defendants was responsible for the act or omission of the other.

3. If the jury shall find from the evidence that the rush of passengers and consequent confusion alleged, which led to the plaintiff being pushed or shoved from the car, as alleged, was caused by the sudden lowering of the gates upon the street car, as testified to in behalf of the plaintiffs, and that such lowering of the gates was an act of negligence on the part of the gate-keeper, the servant of the Baltimore & Potomac railroad, but that the agents of the Washington and Georgetown Railroad Company did not know and had no reason to believe that the gates would be so lowered, then the latter defendant is not responsible for such negligence. It is not

144 responsible for the negligence of the said gate-keeper and was not called upon to anticipate such negligence.

4. If the injury to the plaintiff was caused by her being shoved or pushed from the car in the rush of passengers and confusion resulting from the sudden lowering of the gates, as mentioned in the preceding prayer, there is no evidence that the conduct and management of the street car entered into or contributed to the negligence of the gate-keeper, and the verdict of the jury, if they finn the injury was so caused, must be in favor of The Washington & Georget*w*on Railroad, defendant.

5. If from the whole evidence the jury should find that the street car could and would have passed the steam track without injury to the plaintiff except for the lowering of the gates upon said car after they had been raised to allow the car to pass over the steam track, and that the said lowering was the cause of the injury to the plaintiff and was an act of negligence on the part of the gate-keeper, then the Washington and Georgetown railroad is not responsible for said injury, and the verdict of the jury must be in its favor.

6. If the jury shall find from the evidence that the injury to the plaintiff was caused by her jumping from the car voluntarily, and not as set forth in the declaration, the plaintiffs are not entitled to recover in this action. The declaration does not aver that the injury was caused by her own act, impelled by sudden alarm and to avoid imminent danger, and her own evidence is to the contrary.

145 7. The plaintiffs are not entitled to recover in this action for medical attendance or expenses, nor for loss of time on the part of the injured plaintiff, nor *got* the loss of her services on the part of her husband.

8. If it is ruled that under the declaration it may be shown as a ground for recovery that the plaintiff jumped off the street car, then the court is asked to instruct the jury as to the legal limitations as to such acts.

9. If from the whole evidence the jury shall find that the injury to the plaintiff was the result of the negligence of the gate-keeper in the management of the gates, the agent of the Baltimore & Potomac Railroad Company, and but for such negligence would not have been sustained by the plaintiff, and that the Washington & Georgetown Railroad Company, through its agents in charge of the street car, did not know and had no reason to believe that the said gate-keeper would be negligent, then the plaintiffs are not entitled to recover against the latter company.

And thereupon the court gave the instructions numbered 2, 7, & 8 and refused to give instruction numbered 9 as prayed, but modifies the same so as to make it read as follows:

"If from the whole evidence the jury shall find that the injury to the plaintiff was the result of the negligence of the gate-keeper in the management of the gates (if you shall find that he was),

146 the agent of the Baltimore & Potomac Railroad Company, and but for such negligence would not have been sustained by the plaintiff, and that the Washington & Georgetown Railroad

Company, through its agents in charge of the street car (was not negligent in driving the street car on said steam-car track and) did not know and had no reason to believe that the said gate-keeper would be negligent, then the plaintiffs are not entitled to recover against the latter company," and gave the same as so modified; and the court further refused to give the others of said instructions or any of them—that is to say, instructions numbered, respectively, 1, 3, 4, 5, & 6—and to the refusal of the court to give prayer numbered 9 as prayed, and to the modification thereof, and to the refusal of the court to give each of the instructions numbered 1, 3, 4, 5, & 6, the defendant The Washington & Georgetown Railroad Company, by its counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

And to said prayer numbered 9, presented by the defendant The Washington & Georgetown Railroad Company, and before it was given as modified, the defendant The Baltimore & Potomac Railroad Company, by its counsel, then and there objected, and upon the overruling of such objection and to the giving of said instruction numbered 9, as so modified, the defendant The Baltimore & Potomac Railroad Company, by its counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

And thereupon the court, of its own motion, after reading the declaration, charged the jury as follows:

147 You will perceive, gentlemen, by the declaration which I have just read that the claim of the plaintiffs as to their right to recover consists in the charges which they make that the defendant (The Baltimore & Potomac Railroad Company, through its gate-keeper, if you shall find by the evidence that the gate-keeper was the servant of the Baltimore and Potomac Railroad Company, unskilfully and negligently managed the gate in lowering it and raising it at an improper time), and that the negligence charged against the defendant The Washington & Georgetown Railroad Company consists in the charge that the driver of the car owned and operated by the Washington and Georgetown Railroad Company negligently and unskilfully drove the car or the horses attached to the car onto and partly across, perhaps, the track of the steam-railroad company at a time when a train of the Baltimore & Potomac Railroad Company was approaching the intersection of these two roads on Seventh street. It is not charged that this railroad train upon the Baltimore & Potomac railroad track was run at an unlawful rate of speed, (but that there was negligence in the running of that train which contributed to the injury which the female plaintiff claims in this declaration she suffered on this occasion.) The rate of speed, however, is properly enough mentioned in the declaration, and evidence in regard to that train and the speed with which it was run has been admitted to you because, in the judgment of the court, that would be a circumstance to which the

148 jury might refer and of which they ought to take notice in determining the question whether, under these circumstances as they may be shown by the evidence in this case, (the female

plaintiff was either justified as a person of ordinary prudence in jumping from the car at the time she did under the apprehension of imminent danger) or whether she was thrown from the car, whether these circumstances surrounding all the passengers at the moment of time when she jumped were such as would naturally produce such confusion and disorder among the passengers as that she might be thrown by some one or more of the passengers from the car to the ground on that occasion, and whether that was such disorder and confusion as would be reasonable to expect would be caused among people who were ordinarily prudent—that is, all the circumstances surrounding all the passengers at that time who were upon the street car. Of course the circumstances will be more particularly adverted to. I now only refer to this matter for the purpose of impressing upon your minds the office of the averment in this declaration that there was a train of steam cars approaching upon the road of the Baltimore & Potomac Company at the instant of time when the driver of the street car is alleged to have entered upon the track of the steam-car company for the purpose of crossing That is not in and of itself alleged as negligence. (The rate of speed, whether rapid or slow, is not alleged as in and of itself a matter of negligence, but only as a circumstance surrounding the parties which it is proper the jury should know and understand in order to enable them to determine whether there was or was
149 not such a state of affairs there at that moment when this woman left this car as either justified her in jumping from the car or as would justify the disorder among the passengers by which she might have been thrown from the car.)

I have been asked by counsel for the plaintiff in this case to give you a number of instructions, which I will proceed to do:

1. If the jury believe from all the evidence that on the 12th day of August, 1889, the plaintiff Margaret L. Hickey was a passenger on one of the cars of the defendant The Washington & Georgetown Railroad Company on Seventh street west, which car was approaching the steam-railroad track of the defendant The Baltimore & Potomac Railroad Company on Maryland avenue southwest, upon which a train of steam cars was approaching the point of junction from the west, and while said street car was approaching said point the agents of the said Washington and Georgetown Railroad Company so negligently and imprudently managed said street car and the agents of the defendant The Baltimore and Potomac Railroad Company engaged in running the said train of steam cars and the gate-keeper operating the gates at the crossing, if the jury believe from the evidence that he was an employé of the Baltimore and Potomac Railroad Company, so negligently and imprudently managed said gates that the passengers in said street car were under a reasonable apprehension that a collision between said street car and said train of steam cars was imminent, and that in a reason-
150 able effort to avoid injury from said collision the said Margaret L. Hickey jumped from said street car or through the conduct or efforts of some other passenger or passengers in said car, acting in a reasonable manner and under a reasonable apprehension

of an approaching collision, in endeavoring to avoid injury from such collision was pushed and shoved from said street car and was thereby thrown to the ground, sustaining the injuries for which this suit is brought, then the verdict of the jury shall be in favor of the plaintiffs and against both defendants, even though the jury should believe that had the plaintiff Margaret remained or been allowed to remain in said street car she would have in fact avoided any injury.

The second prayer of the plaintiff- which is given to the jury is as follows:

2. If the jury believe from all the evidence that on the 12th day of August, 1889, the plaintiff Margaret L. Hickey was a passenger on one of the cars of the defendant The Washington and Georgetown Railroad Company going south on Seventh street near the junction of the tracks of said company with the track on Maryland avenue of the Baltimore and Potomac Railroad Company and while in said car and while in the exercise of due car- and prudence the engine and cars of a train of the Baltimore and Potomac Railroad Company which was approaching the point of junction from the west was so carelessly and negligently managed by the engineer and persons in charge thereof and that the gate-keeper op-
151 erating the gates at the crossing, if the jury believe that he was an employé and agent of the said Baltimore and Potomac Railroad Company, so negligently managed the said gates at said time that as said street car and said train of steam cars approached each other the plaintiff Margaret and other passengers in said street car were under a reasonable apprehension that a collision was imminent, and the said Margaret jumped off said car in a reasonable effort to avoid injury from such collision or was pushed or thrown from said car by some other passenger or passengers endeavoring in a reasonable manner to avoid injury from such collision, and the plaintiff Margaret was thereby injured, then the plaintiffs are entitled to recover against the defendant The Baltimore and Potomac Railroad Company, even though the jury may believe from the evidence that by remaining or being allowed to remain in said street car the said plaintiff Margaret would in fact have avoided injury.

This instruction, you notice, is similar to the first which I read to you, except that it is an instruction intended to embrace only the Baltimore and Potomac Railroad Company in the event that you should consider that that company alone was liable and that it alone should be made responsible by your verdict.

The third instruction is drawn with a view to showing you under what circumstances the Washington and Georgetown Railroad Company should be held liable to you, and is as follows:

3. If the jury believe from all the evidence that the plaintiff Margaret L. Hickey on August 12, 1889, was a passenger on one off the cars of the Washington & Georgetown Railroad Company going south on Seventh street near the junction of the tracks of said company with the track on Maryland avenue of the de-

152 fendant The Baltimore and Potomac Railroad Company and while in said car and while in the exercise of due care and prudence through the negligence of the driver of said street car said car was so managed and driven towards and upon said steam track as a train of steam cars thereon was approaching from the west that the plaintiff Margaret and other passengers in said street car were under a reasonable apprehension that a collision was imminent, and while under such apprehension and in a reasonable manner the plaintiff Margaret jumped from the car in an effort to avoid danger from such collision or was pushed or thrown from said car by some other passenger or passengers on said street car likewise under a reasonable apprehension of an impending collision and in a reasonable endeavor to avoid the same, and thereby the plaintiff Margaret was injured, then the plaintiffs are entitled to recover against the defendant The Washington and Georgetown Railroad Company even though the jury may believe that if the plaintiff Margaret had remained or been allowed to remain in the car she would not in fact have been injured.

The fifth prayer of the plaintiff is given and is as follows:

5. The jury are instructed that if they find from all the evidence that the plaintiffs are entitled to recover they may find a verdict against both the defendants or against one and not against the other, as they may find the liability of both or only one of the defendants from the evidence.

The following prayer, which is offered by the counsel for the Washington and Georgetown Railroad Company, is given to you as a proper instruction in this case. It is the second prayer
153 of the defendant The Washington and Georgetown Railroad Company, which is given to you as the law, and which is as follows:

2. While each defendant was bound to avoid danger to the passengers in the street car, neither of the defendants was responsible for the act or omission of the other.

In other words, each defendant is responsible for their own act and the acts of their agents and servants, but not for the act of the other defendant.

The ninth prayer of the defendant The Washington and Georgetown Railroad Company as modified by the court is as follows, and is given to you as the law:

9. If from the whole evidence the jury shall find that the injury of the plaintiff was the result of the negligence of the gate-keeper in the management of the gates, (if you shall find that he was) the agent of the Baltimore and Potomac Railroad Company, and but for such negligence would not have been sustained by the plaintiff, and that the Washington and Georgetown Railroad Com-, through its agents in charge of the street car, was not negligent in driving the street car on said steam-car track and did not know and had no reason to believe the said gate-keeper would be negligent, then the plaintiffs are not entitled to recover against the latter company.

The following prayer, numbered one, asked by the Baltimore and

Potomac Railroad Company, is given to you as the law, and it is substantially a repetition of what I have already said to you:

1. Under the pleadings in this cause the plaintiffs are not
154 entitled to recover for any negligence, if any, on the part of the employés of the defendant The Baltimore and Potomac Railroad Company in respect of the rate of speed of its steam train approaching Seventh street from the west at or about the time of the accident to the female plaintiff.

No. 10 of the prayers of the defendant The Baltimore and Potomac Railroad Company is given to you as a proper instruction as modified by the court:

10. If the jury believe from the evidence that the female plaintiff was pushed or shoved from the car in which she was riding, and that she would not have been injured if she had been permitted to remain in the car, and shall find from all of the evidence in the case that an ordinarily discreet and prudent person, under the circumstances in which said car was placed as disclosed in the evidence, would have and ought to have remained in the car, and that the person who pushed or shoved the female plaintiff from said car acted imprudently, indiscreetly, and rashly in so doing and from a rash apprehension of danger which did not exist, thereby causing the injury sustained by the female plaintiff, then the defendants are not liable upon the issues joined in this cause to answer in damages for said injury.

(This seems to have been framed for the purpose of meeting the exact allegation in the declaration; but I deem it my duty to say to you, inasmuch as I have already substantially said it to you, that if you should be satisfied from the evidence that instead of being pushed from the car the female plaintiff jumped from the car, and if she did so in a reasonable manner and under a reasonable
155 apprehension of danger, that she might recover, although the exact averment of the declaration is not proven; in other words, proof that she jumped from the car under a reasonable apprehension of danger would be a variance from the exact language used in the declaration in regard to that point.

I now say to you if you believe from the evidence that the female plaintiff jumped from the car in which she was riding, and that she would not have been injured if she had been permitted to remain in the car, and shall find from the evidence in the case that an ordinarily discreet and prudent person, under the circumstances in which said car was placed as disclosed by the evidence, would have and ought to have remained in the car, and that the female plaintiff jumped from the said car imprudently, indiscreetly, and rashly and from a rash apprehension of danger which did not exist, thereby causing the injury sustained by her, then the defendants are not liable upon the issues joined in this case to answer in damages for said injury.)

This last is the charge of the court, not given to you by any request of counsel. It is for the purpose of covering that phase of the case to which I have just called you attention.

It was the duty of the driver of the street car in which the plain-

tiff was riding, before attempting to cross the track of the defendant The Baltimore and Potomac Railroad Company, to look carefully to see whether the gates were descending and that no train was approaching near enough to cause injury to the passengers on his car or to excite reasonable apprehension of a collision in the minds of the passengers; and if the driver saw or might
156 have seen, had he looked, that the gates were descending, and that the train of steam cars was approaching, it was his duty to stop his car until the way was clear of danger; and if you find that, under such circumstances, he did not stop, but drove the horses on through the steam-car track, thereby contributing to or alone causing the injury to the female plaintiff, your verdict should be for the plaintiff- against the Washington and Georgetown Railroad Company.

(Whether your verdict thus found against the latter company should include the Baltimore and Potomac Railroad Company will depend upon whether you find that the gate-keeper was its servant, and that the gate-keeper was also negligent. It was the duty of the gate-keeper to keep a strict watch for approaching trains of cars and to so manage the gates as to prevent street cars on Seventh street from passing onto the track of the Baltimore and Potomac Railroad Company when a train was approaching unless there was ample time for such street car to pass over the track of the latter company in safety before the arrival of the train of steam cars at the point of intersection on the two tracks on Seventh street.)

It is claimed by the counsel for the Washington and Georgetown Railroad Company that there was ample time for its cars to pass over the track of the Baltimore and Potomac Railroad Company before the train of the latter would reach the point of intersection of the two tracks, and that as the car of the former company approached the track of the latter the gates were up, and that the horses drawing the car had reached the steam-car track when the gate-
157 keeper suddenly lowered the gates and thereby produced whatever alarm or confusion the evidence shows ensued among the passengers, including the plaintiff, on the street car.

If you find the evidence establishes these facts as thus claimed by the Washington and Georgetown Railroad Company, it would be entitled to your verdict in its favor.

But it is claimed by the counsel for the Baltimore and Potomac Railroad Company that the gate-keeper had commenced to lower the gates before the street car in question approached to the line of the steam-car track, and that this fact, together with the fact of a train approaching on the steam-car track, could and should have been noted by the driver, and that thereupon it was the duty of the driver of the street car to stop his horses until the train on the steam track had passed Seventh street, but that, instead of so stopping, the driver drove the horses under the gates, which descended on them in the manner shown by the evidence; that thereupon the gate-keeper, as soon as he saw that the horses and car were on the track, immediately raised the gate and allowed the car to pass from the steam-car track, and so the Baltimore and Potomac Railroad Com-

pany claims that there is no liability resting upon them for the injury received by the female plaintiff, as set forth in the declaration.

If you find the facts as so claimed by counsel for the Baltimore and Potomac Railroad Company are proven to be true by the evidence in the case, and if the evidence, in your judgment, shows that the gate-keeper was watchful and diligent in watching the street car's movements and proceeded, immediately on discovering that the street car or horses attached thereto were upon the track and attempting to pass through the gates, to reverse his action
158 and hoist the gates, the Baltimore & Potomac Railroad Company should not be held liable in this action.

You will perceive that there is a direct conflict between the two defendants as to the facts which each claims are established by the evidence; you will also remember that the plaintiff claims, by her counsel in argument, that the evidence establishes the liability of both defendants; that the street-car driver was negligent in driving onto the track when there was a train approaching which he might or ought to have seen and in not noticing the gates descending, if, in fact, they were descending, before the horses attached to the street car started to cross the steam-car track. (And counsel for the plaintiff claim that the gate-keeper was negligent in lowering the gate and continuing to lower it after he discovered or, with due diligence, ought to have discovered that the driver was attempting to take the street car across the steam-car track before the arrival of the train of steam cars.)

Now it will be your duty to carefully review the testimony that has been produced by the parties before you and determine what facts have been established and proved by it, and then determine, under the guidance of the instructions of the court, what verdict you shall render. It does not necessarily follow if you should find one of the defendants guilty of negligence that therefore the other should be excused; both may have been negligent. The question with you must be, Has the plaintiff, by a preponderance of all the evidence, shown that both of the defendants are guilty of negligence? If not, has she shown that one is, but failed to show
159 that the other is guilty? In either event the verdict should be for the plaintiff against one or both of the defendants, according as you may find one or both negligent; or, if you find that the proof fails to show that either of the defendants were negligent, your verdict should be for the defendant.

There is one other condition to your finding any verdict for the plaintiff which I deem it my duty to again call to your attention: (You will observe that whether the injured plaintiff either jumped from the street car or was thrown from it by other passengers, yet the immediate force causing the injury did not proceed from either of the defendants. The law requires *no* corporations and individuals alike engaged in carrying passengers a high degree of diligence and care to be exercised for the safety of their passengers, and in the present case, if the defendants or one of the defendants negligently permitted the passengers upon the street car to be placed

in the condition of apparent imminent danger of an approaching collision of the street car with an approaching train of steam cars, such as would or might reasonably induce a person of ordinary prudence to seek safety by jumping, then whether the female plaintiff jumped from the car or was thrown by others, who were co-passengers with her, from the car, who were acting from the same impulse as to danger, but reasonably, as ordinarily prudent persons would act under such circumstances, then the plaintiff would be entitled to a verdict against one or both of the defendants, as you may find one or both guilty of negligence which directly caused the injury to the female plaintiff.)

160 But you will remember that the negligence for which you should hold the defendants or either of them reponsible must have been negligence which contributed directly to cause the injury; and, repeating the language already given to you, if you find that the plaintiff jumped from the car imprudently, indiscreetly, and rashly, and from a rash apprehension of danger which had no existence, then, though either or both of the defendants' agents or servants may have been negligent, your verdict should be for the defendants and against the plaintiff.

And so, gentlemen of the jury, if you shall find that she was thrown from the car by persons who were under a like apprehension, as I have just mentioned, and who had such an apprehension imprudently and indiscreetly, and under a rash apprehension of danger, which had no existence, in their confusion jostled or threw her from the car, under such circumstance, although the evidence might show that the agents of the defendant acted negligently and carelessly on the occasion referred to in the declaration, neither of them would be liable to a verdict, because the law will not permit a plaintiff to recover if the injury complained of was not only the result of the negligence of the defendant, but was also the result of the direct negligence of the plaintiff contributing directly to the result.

In the event that you should find that she acted rashly and imprudently, without any just cause for apprehension of imminent danger, then the law would esteem that misconduct on her part, such as would contribute directly to the injury which she received, and which would prevent her from recovering from the de-

161 fendants, even though the evidence might establish that they were also guilty of negligence.

The evidence, gentlemen, is somewhat conflicting, and there are a great many witnesses in the case. It is not, perhaps, an easy task for you to analyze this testimony and arrive at an exact conclusion; but it is your duty to do so, and you should make every effort to comply with your duty.

I do not now think of any matter it is essential for me to further call to your attention before you retire.

The following prayer asked by the defendant The Baltimore & Potomac Railroad Company is given to you as the law:

"In this action the plaintiffs are not entitled to recover for medical or other attendance or expenses, nor for the loss of time in con-

sequence of the injury sustained, nor for the loss to the male plaintiff of the services or society of his wife."

Also the following prayer, numbered 7, asked by the Washington and Georgetown Railroad Company upon the same subject as the last one which I have just read to you:

"The plaintiffs are not entitled to recover in this action for medical attendance or expenses, nor for the loss of time on the part of the injured plaintiff, nor for the loss of her services on the part of her husband."

I will also give you, as the law in this case, the plaintiffs' prayer No. 4, which is as follows:

"If the jury find from all the evidence that the plaintiffs are entitled to recover in this action, then they shall award such
162 damages within the limits of the sum claimed in the declaration as will fairly and reasonably compensate the plaintiff Margaret for the pain and suffering caused to her by the injury which she sustained and for the injury to her bodily health and power of locomotion, if any such they find, which she has sustained in the past and will continue to sustain in the future as a natural consequence of said injury, and for such internal injuries and impairment to her physical health as they may find to be established by the evidence."

Your verdict, if you find for the plaintiff, must be a matter to be fixed by you in the exercise of a sound discretion, subject, of course, to the limits placed in the declaration of thirty thousand dollars.

To such portions of said charge as direct the jury that the plaintiffs are entitled to recover in the action in case they find that the female plaintiff jumped from the car, such portions being enclosed in brackets, the defendants and each of them separately and severally, by their counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

And to such portions of said charge as direct the jury how the duty of the driver and conductor of the street car should be performed, such portions being enclosed in brackets, the defendant The Washington & Georgetown Railroad Company, by its counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

163 And to such portions of said charge as define the duty of the gate-keeper and how it should be performed and to such portions as direct the jury that they may find against the defendant The Baltimore & Potomac Railroad Company in case they find that the gate-keeper was negligent in the performance of his duty, the same being enclosed in brackets, the said defendant, The Baltimore & Potomac Railroad Company, by its counsel, then and there excepted and prayed the court to note the same upon its minutes, which was done.

All of the foregoing proceedings were had and all of the said exceptions taken and noted before the jury retired to consider of their verdict.

And thereupon, after the foregoing proceedings, which are hereby

made part hereof, and before the jury retired to consider of their verdict, the defendants, by their counsel, severally prayed the court to sign and seal this their bill of exceptions and make the same a part of the record, to have the same force and effect as to each and every of the exceptions taken by the defendants and each of them and noted by the court as aforesaid as if the same had been set forth in a separate bill of exceptions signed and sealed by the justice presiding at the trial, which was granted, and accordingly, before the jury retired to consider of their verdict, the justice presiding signs and seals this the said bill of exceptions, to have
164 the force and effect aforesaid, now for then, this 7th day of July, A. D. 1894.

E. F. BINGHAM, *C. J.* [SEAL.]

Settled by consent.

HAMILTON & COLBERT,
Attorneys for Plaintiffs.
SAM'L MADDOX,
Attorney for the B. & P. R. R. Co.
W. D. DAVIDGE,
Att'y for W. & Geo. T. R. R. Co.

In the Supreme Court of the District of Columbia.

MARGARET L. HICKEY *et al.*
vs.
THE WASHINGTON & GEORGETOWN RAILROAD COMPANY *et al.*
} At Law. No. 30767.

Be it remembered that at the hearing of the motions for a new trial in the above-entitled cause all the evidence in support of and against the said motions was as set forth in the foregoing bill
165 of exceptions, which is hereby made a part hereof, and that the court upon said hearing overruled the said motions for the grounds alleged, except the ground of excessive damages, as to which the court found that the damages were excessive, but the court refused to grant a new trial upon the said ground unless in the event that the plaintiffs failed to remit from the verdict within five days the sum of six thousand dollars, upon which remission the plaintiffs were to be entitled to judgment, as will fully appear by the order of the court, and from such order allowing judgment and from the judgment rendered after remission and each of them the defendants appealed and pray the court to sign and seal this their second bill of exceptions, which is accordingly done, now for then, this 7th day of July, A. D. 1894.

E. F. BINGHAM, *C. J.* [SEAL.]

166 In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from 1 to 165, inclusive, to be a full, true, and correct transcript of the record of all the proceedings had in said court in cause numbered 30767, at law, wherein Margaret L. Hickey and John P. Hickey, her husband, are plaintiffs and The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company are defendants, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Washington, in said District, this 26th day of July, A. D. 1894.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 364. The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company, appellants, *vs.* Margaret L. Hickey and John P. Hickey. Court of Appeals, District of Columbia. Filed Jul- 31, 1894. Robert Willett, clerk.

83 In the Court of Appeals of the District of Columbia.

TUESDAY, *February 5th, A. D.* 1895.

THE WASHINGTON AND GEORGETOWN RAILROAD Company and The Baltimore and Potomac Railroad Company, Appellants,
vs.
MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband.
} No. 364.

The argument in the above-entitled cause was commenced by Mr. S. Maddox, attorney for the appellant The Baltimore and Potomac Railroad Company, and was continued by Mr. M. J. Colbert, attorney for the appellees.

WEDNESDAY, *February 6th, A. D.* 1895.

THE WASHINGTON AND GEORGETOWN RAILROAD Company and The Baltimore and Potomac Railroad Company, Appellants,
vs.
MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband.
} No. 364.

The argument in the above-entitled cause was concluded by Mr. W. D. Davidge, attorney for the appellant The Washington and Georgetown Railroad Company.

84 THE WASHINGTON AND GEORGETOWN RAILROAD Company and The Baltimore and Potomac Railroad Company, Appellants,
vs.
MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband.
} No. 364.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This action was brought by husband and wife, the appellees on this appeal against The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company, the appellants, to recover for injuries suffered by the female appellee, occasioned as alleged, by the joint or concurrent negligence of the agents or servants of the two railroad companies.

The Washington and Georgetown Company operated a line of street railway horse cars, for the carriage of passengers, on Seventh street west, running north and south, and crossing Maryland avenue, in the city of Washington; and the Baltimore and Potomac Company operates a steam-car railroad, for the carriage of passengers and freight, and runs east and west, over and along a part of Maryland avenue. These two lines of railroad cross each other at

the intersection of Seventh street west and Maryland avenue. At this point of intersection, in order to avoid collisions at the crossing, and to protect persons and vehicles passing on Seventh street, there were gates maintained, in charge of a gate-keeper, by the steam railroad company. These gates consisted of wooden arms, which, by means of cranks, could be lowered simultaneously on both sides of the steam-railroad tracks, from an upright to a horizontal position across Seventh street. The gate keeper, charged with the man-gement of the cranks, was an employee of the steam-car railroad company, as shown by the evidence; and it was his duty to lower the gates whenever a train or locomotive was approaching the crossing on Maryland avenue. These gates were situated one on the north side and one on the south side of the steam-car tracks, about twelve and a half feet apart; and it required only a short time, less than a minute, to lower or raise the gates.

The accident occurred on the 12th of August, 1889, at this crossing. The female plaintiff was a passenger in a street car, running on Seventh street, which crossed from north to the south side of the steam-car tracks, on the occasion when the accident occurred. In the declaration, it is alleged that she became a passenger in the street car at the junction of Seventh street west and Pennsylvania avenue, &c.; and thence said car proceeded southerly along Seventh street until it approached the point before mentioned where the tracks of the said steam-car railroad cross Seventh street, and as the said street car approached said crossing, going south, a train of cars operated and managed by the agents and servants of the Baltimore and Potomac Railroad Company also approached said crossing from the west; "and the plaintiffs aver that it was the duty of the driver of the said street car, and of the engineer and other employees of the defendant, The Baltimore and Potomac Railroad Company, to so conduct and manage the said street car, and the said train of steam cars, as to avoid danger to the passengers in said street car; but the plaintiffs aver, that unmindful of their duty in the premises, the said defendants, and each of them, and their and each of their servants and employees in charge of said car and train, conducted themselves so carelessly and negligently that as said street car approached said crossing the gate-keeper who was operating the gates or guards at said crossing, which, &c., negligently allowed the driver of said street car to drive the same partly beneath the said gates and partly over and across the tracks of the said Baltimore and Potomac Railroad Co.; and the plaintiffs further aver, that the driver of said street car so negligently and carelessly conducted and managed his said car that before said street car could entirely cross said tracks the said gates were suddenly lowered upon said street car, said train of steam cars approaching rapidly all the while; and the passengers in said street car, seeing the danger of impending collision, and endeavoring to save themselves from the consequences thereof, rushed from said street car to a place of safety upon the ground, and in the confusion thereby created the female plaintiff, who was conducting herself in a careful and prudent manner, was pushed and shoved from her seat in

said car and thrown violently to the ground, and in falling her foot and leg were caught beneath the wheels of said car, and said wheels passed over the same, crushing and breaking the bones of the ankle and leg and almost severing the foot from the leg, and she further sustained severe cuts and bruises in various parts of her limbs and body, &c. * * * And the plaintiffs aver that the injuries occasioned to the female plaintiff were caused by the gross carelessness and neglect of said defendants, and each of them, their and each of their servants and employees," &c.

The defendants pleaded separately, and each pleaded the general-issue plea of not guilty. The verdict being for the plaintiffs, there was a motion in arrest of judgment by The Baltimore and Potomac Railroad Company, one of the defendants, and also a motion for a new trial by both of the defendants. Both motions were overruled—the motion for a new trial being overruled upon condition that half the amount of the verdict be remitted, and the *remittitur* was accordingly entered, and the judgment was entered upon the verdict for $6,000 and costs. It is from this judgment that each of the defendants have appealed.

It is shown by the evidence that the street car was an open summer car crowded with passengers; and that when it approached the crossing, according to the testimony of some of the witnesses, it proceeded with more than ordinary speed. As this street car neared the crossing an east-bound train on the steam-car tracks approached the intersection of the tracks of the two roads; and this approaching train was plainly in view of both the driver of the street car and the gate-keeper, if they had been on the lookout for it. It appears that, as the street car approached the crossing, the gates were partially lowered, and the street car, if it did not actually stop, slackened its speed; but at that moment the gates were raised and the street car proceeded to cross the tracks of the steam-car road in front of the approaching train. This, as the result showed, would have been entirely successful, and without producing alarm and terror to the passengers, though exceedingly perilous, but for the fact that, just as the street car got upon the steam-car tracks,
85 the gates were let down again, the south arm of the gates falling about the manes of the horses, and the north arm over the top of the street car; and thus catching the street car immediately on the tracks of the approaching steam-car train, and which, at that moment, according to the testimony of some of the witnesses, was only about fifty or sixty feet distant from the crossing. The passengers in the street car were at once naturally stricken with excitement and terror, many jumping from the car, and in the midst of the commotion and confusion, Mrs. Hickey, the female plaintiff, was either pushed or she jumped from the car, and fell upon the ground, and, in some way, not very clearly shown, one of her feet was caught and most seriously injured—whether by contact with the wheels of the car, or in some other way, may admit of some question. She thinks and testifies that the wheel of the car passed over her ankle, and produced the in-

jury to it. In whatever way the injury may have been received, the evidence shows clearly that it was very serious.

In the midst of the excitement and confusion produced by the lowering of the gates and the obstruction of further progress of the street car, the gates were again raised, and the street car moved on, barely succeeding in escaping collision with the passing train of steam cars. The fault of the gate-keeper seems to have been in not lowering the gates in time to keep the street car from attempting to cross the steam railroad tracks, and in lowering the gates when the street car was immediately on the steam-car tracks, and thus preventing, for the moment, further advancement. The fault of the street-car driver was in the reckless approach to the crossing, and attempting to cross, when he saw, or should have seen, the near approach of the steam-car train to the crossing. Without the fault of both the gate-keeper at the crossing and the driver of the street car, it is not at all probable that the accident would have occurred.

As preliminary to the consideration of the questions that relate in common to both the defendants, there are some two or three questions specially raised as applicable to the one or the other of the defendants separately. The first of these is the question raised on the motion in arrest of judgment by the Baltimore and Potomac Railroad Company. This motion is based upon the supposed failure of the plaintiffs to allege in the declaration that the gate-keeper at the crossing, to whom negligence was imputed, was a servant of the Baltimore and Potomac Railroad Company, and because of the supposed failure of the declaration to aver that the said railroad company was bound by any duty in connection with the gates at the crossing.

The declaration may not be very artistically drawn or full in its averments, but we think there is enough in the averments of the declaration, after trial and verdict, to sustain the judgment for the plaintiffs. The declaration avers that the defendants, and each of them, and their and each of their servants and employees, so carelessly and negligently conducted themselves, that as the street car approached the crossing, the gate-keeper "who was operating the gates or guards at said crossing, erected for the purpose of preventing damage to vehicles and foot passengers, negligently allowed the driver of the street car to drive the same," etc. This averment must be read in connection with and as preliminary to the more general and comprehensive averment that follows, viz: "That the injuries occasioned to the female plaintiff were caused by the gross carelessness and neglect of said defendants and each of them, their and each of their servants and employees."

It is a settled principle of pleading, that where there is any defect or omission in a pleading, whether in substance or form, which would have been fatal on a demurrer, yet, if the issue joined (in this case on the general issue) be such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that the judge would have directed the jury to give the verdict, such defect or omission is cured. 1 Wms. Saund., 228; Township of Lincoln *v.* Cambria Iron Co., 103

U. S., 412, 416. At most, the supposed defect in the declaration is but a defective statement of a good cause of action, and not the statement of a defective or insufficient cause of action; and in such case the verdict always cures the defect. We do not say, however, that the declaration would have been adjudged bad on demurrer. It was not necessary to make a specific averment in the declaration that the gate-keeper was the servant of the railroad company, or that the latter was bound to maintain the gates. It was sufficient to allege that the injury complained of was occasioned by the negligence of the defendants or their servants. Bank of Metropolis *v.* Guttschlick, 14 Pet., 19. And for a like reason there was no error in overruling the objection of the Baltimore and Potomac Railroad Company to evidence offered by the plaintiffs to prove that the gate-keeper was the servant or employee of that company, and for whose negligence that company was liable.

There is also a question made, whether there is not a fatal variance between the facts alleged in the declaration and those in proof, upon which the plaintiffs sought to maintain their right to recover. In the declaration it is alleged that the female plaintiff was pushed and shoved from her seat in the street car, and thrown violently to the ground, and in falling her foot and leg were caught, etc. But in the instruction given by the court, at the instance of the plaintiffs, having reference to the evidence in the cause, the jury were told that if they should find from the evidence that the female plaintiff either jumped off the car, in a reasonable effort to avoid injury from collision, or was pushed or thrown from said car by some other passenger or passengers, endeavoring in a reasonable manner to avoid injury from such apprehended collision, and was thereby injured, the plaintiffs could recover. The plaintiff herself says that she was pushed from her seat and fell on the ground. But whether she fell in consequence of a push received from some other terrified passenger, or in an attempt to save herself by jumping from the car, it would make no material difference in her right to recover. It is not so much the manner of leaving the car as it was the exciting cause that operated upon her, either directly
86 and caused her to jump to save herself, or upon others whose actions were justifiably incited by the impending danger, and, by natural, impulsive movement, forced her from the car. In either case, her fall to the ground and injury were the direct consequences of the apparent and impending danger produced by the negligent conduct of the defendants' servants and employees. There is, therefore, no such variance as should defeat the plaintiffs' right to recover, if the facts were found to exist, as we must assume they were, according to the hypothesis of the instruction given by the court. It is said by the Supreme Court of the United States that no variance ought ever to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial. Nash *v.* Towne, 5 Wall., 689. Here the variance that is supposed to exist was mainly produced by the proof introduced on the part of the defendants and therefore there was no surprise to

them, and it is not pretended that they were in any manner injured by the supposed variance. There is in reality no substantial variance between the allegations and proof.

The defendant, The Baltimore and Potomac Railroad Company, requested the court to instruct the jury that under the pleadings and evidence the plaintiffs were not entitled to recover as against that company; and the other defendant, The Washington and Georgetown Railroad Company, requested that the jury be instructed, that if the injury to the female plaintiff was caused by her being shoved or pushed from the car in the rush of passengers and confusion resulting from the sudden and negligent lowering of the gates at the crossing, as previously described, then there was no evidence that the conduct and management of the street car entered into or contributed to the negligence of the gate-keeper, and the verdict should be in favor of that company.

The court below refused to give either of these proposed instructions and we think very rightly refused to give them. There was evidence before the jury to be considered by them amply sufficient to affect both defendants with liability for the injury, if that evidence was allowed full credence. It was the clear duty of the gate-keeper to keep strict watch, not only for the approach of the locomotive trains, but for the approach of the street cars, and to let down the gates in such full and ample time as would certainly prevent the street cars from entering upon the crossing at a time when there was danger of collision with an approaching locomotive train. In this instance, this duty appears not to have been performed by the gate-keeper. The letting down the gates upon the street car when the latter was immediately upon the crossing, with the locomotive train in such near approach, was more than ordinary negligence; it would appear to have been a reckless indifference to the safety of human life. And the conduct of the driver of the street car was scarcely less reprehensible. He must have seen the near approach of the train, and therefore the danger of attempting to cross the tracks in front of the locomotive. If he did not see the approaching train it was because of his negligent failure to keep a lookout for the safety of his passengers. The train was plainly in view, and he did see or could have seen it before he reached the crossing, and in time to avoid the peril of the attempt to cross. His failure to observe the proper precautions before attempting to cross the tracks of the steam railroad amounted to gross negligence and a reckless want of care for the safety of his passengers.

Both defendants, by their servants and employees, having been guilty of negligence and thereby contributed to the production of the injury complained of, are equally liable for such injury. The rule is well established, that where a person suffers an injury from the joint or concurrent negligence of two parties, and both are negligent in a manner which contributes to the injury, they are liable jointly and severally for such injury, and no mere comparative degree of care required, or comparative degree of culpability shown will affect the liability of either of the defendants. Bunting

v. Hogsett, 139 Penn. St., 363; Gulf, etc., R. R. Co. *v.* McWhirter, 77 Texas, 356; Rankin *v.* Central P. R. R. Co., 73 Cal., 93.

In a case like the present, of an action brought to recover for injuries suffered by a passenger while being carried in a public conveyance, the law requires of the passenger that he or she shall exercise reasonable prudence in looking out for his or her own safety; but the passenger is not bound to use the highest conceivable prudence and caution. In case of an accident to the car or vehicle, or other impending danger, the circumstances of confusion, dismay or terror into which the passengers may be suddenly thrown, are proper to be considered upon the question of contributory negligence of the party injured. An act done by a passenger, in the presence of impending danger, may not in the contemplation of law constitute contributory negligence, though it may in fact have contributed to the production of the injury complained of. Stokes *v.* Saltonstall, 13 Pet., 181. This is illustrated, and is strictly in point to this case, by the case where a passenger in a dangerous emergency jumped from a moving car to save himself, and was injured, although if he had remained in the car he would have escaped unhurt. The party is liable whose negligent conduct has brought about the dangerous emergency under which the injured party acted; the latter party acting according to the ordinary and reasonable motives and impulses that guide mankind under like circumstances. South Cov. & C. Street Railway *v.* Ware, 84 Ky., 267; Cody *v.* N. Y. & N. E. R. Co., 151 Mass., 462.

In view, therefore, of the principles of law just stated, and the evidence in the case, the court below was entirely right in refusing to give the instruction asked by the two prayers, to which we have referred, virtually taking the case from the jury as to each of the defendants.

We come now to the instructions granted on the part of the plaintiffs, and to the charge of the court upon the whole case.

87 By the facts, constituting the hypothesis of the first prayer of the plaintiffs, which was granted as explained by the court, the negligence of both defendants co-operated in producing the excitement and apparent danger that was the immediate cause of the injury. Without the negligence of the one, that of the other might have been entirely harmless. Neither could claim exemption from liability upon the ground that the negligence of the other was the more immediate or direct cause of the injury that happened to the female plaintiff. All three of the prayers of the plaintiffs, enumerating the facts upon which the defendants would be liable, were entirely unobjectionable, as explained by the court in its charge to the jury.

Considerable confusion has been introduced into the case by reason of the separate and adversary instructions sought by the defendants as between themselves—the defendants mutually attempting to place the exclusive blame or liability for the accident the one upon the other. But, according to the principles of liability in such case, as we have shown, the rulings of the court upon these separate series of proposed instructions were correct, and the gen-

eral charge upon the whole case was fair, and fully discriminated as to the elements of liability of both defendants.

The court instructed the jury, at the instance of both defendants, that if the female plaintiff voluntarily jumped from the car, as testified to by the witnesses for the defendants, she could not recover; and the jury were also instructed, that while each defendant was bound to avoid danger to the passengers in the street car, neither of the defendants was responsible for the negligent acts or omissions of the other. And, at the instance of the Washington and Georgetown Railroad Company, the jury were instructed, that if the injury of the plaintiff was the result of the negligence of the gate-keeper in the management of the gates, and but for such negligence the injury would not have been sustained by the plaintiff, and that the street-car company, through its agents and servants, was not negligent in driving the street car on the steam-car tracks, and did not know, and had no reason to believe that the gate-keeper would be negligent, then the plaintiffs were not entitled to recover as against the latter company. This, in view of the undeniable facts, was certainly liberal to the defendant, the street-car company.

The court also instructed the jury, at the instance of the Baltimore and Potomac Railroad Company, that if the female plaintiff was pushed or shoved from the car in which she was riding, and that she would not have been injured if she had been permitted to remain in the car, and that an ordinarily discreet and prudent person, under the circumstances, would have and ought to have remained in the car, and that the person who pushed or shoved the plaintiff from the car acted imprudently, indiscreetly, and rashly in so doing and from a rash apprehension of danger which did not exist, thereby causing the injury to the plaintiff, then the defendants were not liable. And so the jury were further instructed, that if the female, plaintiff jumped from the car, and that she would not have been injured if she had remained in the car, and that an ordinarily discreet and prudent person, under the circumstances, would have remained in the car, and that the plaintiff jumped from the car imprudently, indiscreetly, and rashly from an unfounded apprehension of danger, thereby causing the injury, then the defendants were not liable, and the verdict should be in their favor. And in a subsequent part of the charge, the court was explicit in stating the rights of the parties, and the manner of finding the verdict, thus: "It does not necessarily follow, if you should find one of the defendants guilty of negligence, that therefore the other should be excused; both may have been negligent. The question with you must be, has the plaintiff, by a preponderance of all the evidence, shown that both of the defendants are guilty of negligence? If not, has she shown that one is, but failed to show that the other is guilty? In either event the verdict should be for the plaintiff against one or both of the defendants, according as you may find one or both negligent; or, if you find that the proof fails to show either of the defendants negligent, your verdict should be for such defendant."

We have thus extensively quoted from the charge to show the fairness and fullness with which the questions were submitted to the jury. The charge was full and covered the entire case; and there is nothing in the charge, or in the instructions given, that could likely be misapprehended, or that was calculated to mislead an ordinarily intelligent jury. The defendants received the benefit of all the law to which they were entitled. The questions of the negligence of both the gate keeper and the driver of the street car were carefully distinguished and discriminated, the one from the other, so that neither defendant should be made liable for the consequences of negligence that was exclusively attributable to the other. The jury have found both of the defendants guilty of negligence in the production of the injury complained of; and for this finding there was ample evidence before them.

There is a question made upon the fourth prayer of the plaintiffs, which was granted, to the effect that its terms were too suggestive of excessive damages. But assuming that the jurors were men of ordinary intelligence, we do not think they could have been misled by the terms of the instruction. They were simply told, that if they found for the plaintiffs they should award such damages, within the limits of the sum claimed in the declaration, as would fairly and reasonably compensate the female plaintiff for the injuries suffered by her. The jurors must have understood that fair and reasonable compensation was the limit of the award of damages, under the instruction. The amount of damages laid in the declaration was $30,000, and the verdict was for $12,000; so that there was nothing in the verdict to indicate that the jury acted upon the idea that the amount claimed in the declaration, in any way furnished the criterion for determining the amount of compensation to be awarded to the plaintiff. We must suppose that the jurors paid heed to the terms of the instruction, and only awarded such sum as, in their judgment, was a fair and reasonable compensation to the female plaintiff for the injury she had received.

Finding no error in the rulings of the court below, the judgment appealed from must be affirmed; and it is so ordered.

Judgment affirmed.

88 MONDAY, *March 4th, A. D.* 1895.

THE WASHINGTON AND GEORGETOWN RAILroad Company and The Baltimore and Potomac Railroad Company, Appellants,
vs.
MARGARET L. HICKEY and JOHN P. HICKEY, Her Husband.
} No. 364. January Term, 1895.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel; on consideration whereof it is now here ordered and ad-

judged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. Chief Justice ALVEY.

March 4, 1895.

89 Thursday, *March 7th, A. D.* 1895.

The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company, Appellants,
vs.
Margaret L. Hickey and John P. Hickey, Her Husband.
} No. 364.

On motion of Mr. Samuel Maddox, attorney for the appellants in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of twelve thousand dollars.

90 Know all men by these presents that we, The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company, as principals, and George T. Dunlop and John Cassels, as sureties, are held and firmly bound unto Margaret L. Hickey and John P. Hickey, her husband, in the full and just sum of twelve thousand dollars, to be paid to the said Margaret L. Hickey and John P. Hickey, her husband, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company, appellants, and Margaret L. Hickey and John P. Hickey, her husband, appellees, a judgment was rendered against the said The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company, and the said The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Margaret L. Hickey and John P. Hickey, her husband, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company shall prosecute said writ of error to effect and answer all damages and costs if they fail

to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY,
By ENOCH TOTTEN, *Its Att'y-in-fact.* [SEAL.]
THE BALTIMORE AND POTOMAC RAILROAD COMPANY,
By ENOCH TOTTEN, *Its Att'y-in-fact.* [SEAL.]
GEORGE T. DUNLOP. [SEAL.]
JOHN CASSELS. [SEAL.]

Sealed and delivered in the presence of—
—— ——.

The sureties on this bond are satisfactory.
G. E. HAMILTON,
M. J. COLBERT,
Attorneys for Appellees.

Approved by—
M. F. MORRIS,
Associate Justice.

[Endorsed:] No. 364. The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Co., appellants, *vs.* Margaret L. Hickey and John P. Hickey, her husband. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed March 14, 1895. Robert Willett, clerk.

91 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company, appellants, and Margaret L. Hickey and John P. Hickey, her husband, appellees, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by—
——— ———.

92 UNITED STATES OF AMERICA, *ss:*

To Margaret L. Hickey and John P. Hickey, her husband, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, chief justice of the Court of Appeals of the District of Columbia, this 14th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged.
G. E. HAMILTON,
M. J. COLBERT,
For Appellee-.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 14, 1895. Robert Willett, clerk.

93 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 92, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company, appellants, *vs.* Margaret L. Hickey and John P. Hickey, her husband, No. 364, January term, 1895, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 26th day of March, A. D. 1895.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 15,857. District of Columbia Court of Appeals. Term No., 253. The Washington & Georgetown Railroad Company and The Baltimore & Potomac Railroad Company, plaintiffs in error, *vs.* Margaret L. Hickey and John P. Hickey, her husband. Filed April 4th, 1895.

MAR 29 1897
JAMES H. McKENNEY,
CLERK

166-521

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 253.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY AND THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

MARGARET L. HICKEY AND JOHN P. HICKEY, HER HUSBAND.

BRIEF FOR THE BALTIMORE AND POTOMAC RAILROAD CO., PLAINTIFF IN ERROR.

SAMUEL MADDOX,
Attorney for the Baltimore and Potomac Railroad Company.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 253.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY AND THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

MARGARET L. HICKEY AND JOHN P. HICKEY, HER HUSBAND.

BRIEF FOR THE BALTIMORE AND POTOMAC RAILROAD CO., PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the morning of August 12, 1889, Mrs. Hickey, the female defendant in error, boarded a car belonging to the Washington and Georgetown Railroad Company, bound southward along Seventh street. She was going to her home on D street between Second and Third streets southwest, in the city of Washington. The car was an open summer car, weighing about 4,000 pounds. There

were nine seats in the car, and at the end of each was an iron casting or arm support, about thirteen inches high, over which the seats turned. There was also at the end of each seat an upright post, extending from the floor to the roof of the car, to which was attached on the outside an iron handle, to aid passengers in getting on and off the car. The distance from the center of one of these posts to the next was twenty-four inches. At the bottom, the open space was about twelve inches, enough for a person of ordinary size to get in and out easily. Of the nine seats in the car seven were reversible, the two end seats being stationary. The seats accommodated five passengers each. On the side of the car was a running board, intended as a step for getting on and off the car; it was also used by standing passengers when the seats were full. On this particular morning there were from seventy-five to eighty passengers on the car, such of them as could not find seats standing on the front and rear platforms and on the running boards, especially on the west side, which was protected from the sun.

Many of the passengers had baskets and were going on an excursion down the river. Some of them were apparently impatient, and frequently urged the driver to "hurry up." The driver of the car, a man named Harding, was not a regular driver, but an "extra," employed occasionally when there was work for him to do.

At Maryland avenue the street-car tracks crossed the tracks of the Alexandria and Washington Railroad Company, which maintained a single track along Maryland avenue at that point. This track was also used at the time by the Alexandria and Fredericksburg Railroad Company, the Baltimore and Potomac Railroad Company, and the Washington Southern Railroad Company. At this crossing gates had been erected, and were then in use, which were lowered as steam trains approached to warn pedestrians, vehicles, and street cars to stop until the trains had passed. The gates consisted

of a single piece of wood, or arm, made of three-quarter-inch white pine, and would break if run against by a light buggy or a bicycle. They were not strong enough to stop the street car, but would have broken to pieces if struck by it. It was not shown by whom these gates were erected or whose duty it was to maintain them. They were lowered and raised by turning a crank, connected with which were bells that rang as the gates went up and down. The apparatus for raising and lowering the gates was on the south side of the steam-car tracks and on the west side of Seventh street, about forty feet from the point of intersection of the west street railroad track and the steam-car tracks. No great amount of labor was necessary to raise or lower the gates; a ten-year-old boy could have done it. The process of lowering took about half a minute, and when completely down they were about four feet from the ground. It was the habit of the gatekeeper to begin lowering the gates when a train approaching from the west reached Ninth street.

Between Seventh and Ninth streets there is no street extension, but an open space, rectangular in shape, formed by the intersection of Maryland and Virginia avenues, Eighth and C streets. It is 215 feet wide from north to south, and 541 feet long from east to west. From a point on Seventh street, 75 feet north of the steam-car track, a train can be seen on Maryland avenue as far west as Ninth street.

On the morning of the accident, and immediately preceding it, the Alexandria local train, due at the Sixth Street depot at half past 9 o'clock, was approaching from the west. The train was on time and running at its usual rate of speed, five or six miles an hour, according to the testimony of the engineer, one Bowler, who had been a locomotive engineer in the employ of the Baltimore and Potomac Railroad Company for seventeen years. The engine was supplied with air brakes worked from the inside, by which the train could have been stopped in a distance of fifteen or twenty feet. These brakes connected directly with every

wheel under the train, including the driving wheels of the engine. They were not applied at the time of the accident, because the engineer, who was at his post and on the look-out, saw no occasion to do so. He was on the north side of the engine, and saw Mrs. Hickey being assisted by two men as he approached. She was then beyond the reach of injury by his train. He noticed that she was hurt, but so little impression did the occurrence make on him that he did not report it even to the officers of the company.

The driver of the street car first noticed the train when he was crossing the Belt Line street-car tracks about fifty-two feet from the steam-car track. His car was moving at the rate of four and one-half to five miles an hour. The train was then between Eighth and Ninth streets, about three hundred feet from Seventh street. He wanted to cross the steam-car tracks before the gates went down, and thought he could do so without any danger. He did not see that the gates were being lowered as he approached, and did not put on the brakes or make other effort to stop the car until "he got the bell." This was given him by a passenger about the time he was crossing the steam-car tracks. The conductor did not observe that his car was approaching the steam-car tracks or notice the train or the gates. He was busy collecting fares.

Mrs. Hickey occupied the end sitting towards the east of the street about the middle of the car. She alleges that a little before the street car entered upon the steam-car tracks the gates were lowered in front of the horses or on their manes; that at this time the steam train was but a short distance away and was approaching rapidly, whereupon the passengers became very much excited, and in the confusion she was pushed from the car and sustained severe injuries. Some of the witnesses in her behalf testified that the hind wheel of the car passed over her foot.

The injury actually sustained was a compound dislocation of the ankle-joint. No bones were broken, though the ankle-

bone was driven through the skin. She was under the doctor's care five months, and during two months was confined to bed with her foot suspended in a sling. For several months after getting out of bed she was forced to use crutches, and when these were discarded she continued to use a cane for about a year.

On the part of the defense evidence was adduced tending to show that Mrs. Hickey jumped from the car; that there was not the slightest occasion for alarm, and that there was no commotion in the car until after she had jumped.

On these facts a verdict was rendered in favor of the plaintiffs below for $12,000. A motion for a new trial was made on behalf of both railroad companies, which the trial court said must be granted unless a remittitur of $6,000 was entered. This was subsequently done; whereupon judgment was entered against both defendants below for $6,000, from which judgment both appealed to the Court of Appeals of the District. The judgment being there affirmed, a writ of error was sued out by both companies to bring the record and proceedings into this court.

ASSIGNMENTS OF ERROR.

The court below erred:

1. In overruling the motion in arrest of judgment against the Baltimore and Potomac Railroad Company.

2. In admitting evidence tending to show that the gatekeeper was an employé of the Baltimore and Potomac Railroad Company.

3. In permitting the jury to find, on the evidence submitted, that the gatekeeper was an employé of the Baltimore and Potomac Railroad Company.

4. In instructing the jury, as asked by the counsel for the plaintiffs below in the first prayer presented, that if they found that "the agents of the defendant The Baltimore and Potomac Railroad Company engaged in running the said train of steam cars, and the gate-keeper operating the gates at the crossing, if the jury believe from the evidence that he was an employé and agent of the Baltimore and Potomac Railroad Company, so carelessly and imprudently *managed the said gates* that the passengers in said street car were under a reasonable apprehension that a collision between the said street car and said train of steam cars was imminent, and that in a reasonable effort to avoid injury from said collision" Mrs. Hickey jumped or was pushed and shoved from the car, thereby sustaining injury, then their verdict should be in favor of the plaintiffs and against the Baltimore and Potomac Railroad Company.

5. In instructing the jury, as asked by counsel for the plaintiffs below in their second prayer, that they might find from the evidence that the engine and cars of the train of the Baltimore and Potomac Railroad Company were carelessly and negligently managed by the engineer and persons in charge thereof.

6. In refusing to instruct the jury, as prayed by counsel for the Baltimore and Potomac Railroad Company in its

request for instructions numbered 2, that "there is no evidence in the case from which the jury can find that the persons in charge of said train were careless or negligent in the discharge of their duty to the female plaintiff."

7. In refusing to instruct the jury, as prayed by the counsel for the Baltimore and Potomac Railroad Company, that if the "gatekeeper started and was proceeding to lower the gates in time to let them completely down before the train approaching from the west reached Seventh street and with reasonable and proper regard for the rights and safety of persons and vehicles using said street, then the gatekeeper was not negligent in the discharge of his duty."

8. In refusing to instruct the jury, as prayed by the counsel for the Baltimore and Potomac Railroad Company, that it was the duty of the driver of the street car before attempting to cross the steam-car tracks "to look carefully to see whether the gates were descending and that no train was approaching near enough to cause injury to the passengers in his car or to excite apprehension of injury in the minds of the passengers."

9. In refusing to instruct the jury, as prayed by the counsel for the Baltimore and Potomac Railroad Company, that if they should find that the injury to the female plaintiff was caused by her *jumping from the car voluntarily, and not as set forth in the declaration*, the plaintiffs were not entitled to recover.

10. In such portions of the court's charge to the jury as instructed them that the plaintiffs were entitled to recover in case they found that the female plaintiff *jumped* from the car, and in such other portions as defined the duty of the gatekeeper and how it should be performed and instructed the jury that they might find against the Baltimore and Potomac Railroad Company in case of negligence on the part of the gatekeeper.

I.

THE MOTION IN ARREST OF JUDGMENT SHOULD HAVE BEEN GRANTED.

The declaration, after describing the organization of the defendant corporations and the locality of the accident and averring that the female plaintiff was a passenger on one of the cars of the Washington and Georgetown Railroad Company, proceeds:

> . . . "And as the said street car approached said crossing going south a train of cars operated and managed by the servants of the defendant The Baltimore and Potomac Railroad Company, and propelled by a steam engine, also approached said crossing from the west, *going at a rapid rate of speed*, and the plaintiffs aver that it was the *duty* of the driver of the said street car and of the engineer and other employés of the defendant The Baltimore and Potomac Railroad Company to *so conduct and manage* the said street car and *the said train of steam cars as to avoid danger to the passengers in said street car*, but the plaintiffs aver that, unmindful of their duty in the premises, the said defendants and each of them and their and each of their servants and employés in charge of said car and train *conducted themselves so carelessly and negligently* that as said street car approached said crossing the *gatekeeper who was operating the gates or guards at said crossing which were erected for the purpose of preventing damage to vehicles and foot passengers negligently allowed* the driver of the said street car to drive the same partly beneath the said gates and partly over and across the tracks of the said The Baltimore and Potomac Railroad Company; and plaintiffs further aver that the driver of the said street car so negligently and carelessly conducted and managed his said car that before said street car could entirely cross said tracks the said gates were suddenly lowered upon said street car, *said train of steam cars approaching rapidly all the while*, and the passengers in said street car, seeing the danger of impending collision and endeavoring," &c., &c.

In all this the only duty charged upon the Baltimore and Potomac Railroad Company is "*to so conduct and manage the said . . . train of steam cars as to avoid danger to the passengers in said street car*," but no breach of this duty is shown resulting in injury to the female plaintiff. The further averment that the "*employés in charge of said . . . train conducted themselves so carelessly and negligently*" does not charge consequent injury, but that an unattached "gatekeeper," a mere looker-on, for aught that appears, "*negligently allowed*" a careless person, over whom it is not alleged that they had any control, to do a reckless thing. No duty even is charged on the gatekeeper and none on the Baltimore and Potomac Company in respect of gates, nor is it shown that the men in charge of the train contributed in any way to the injury. The alleged rate of speed was "rapid" (whatever that might mean), but there is no averment that it was careless, negligent, or unlawful. Its only offense seems to have consisted in "*approaching rapidly all the while*," but this was a harmless act, for it is not claimed that the female plaintiff was injured thereby, nor yet is it averred that it violated any law or duty in "approaching rapidly."

The rule of law applicable to the case under consideration may be stated thus: *When any particular fact is essential to the plaintiff's title, if such fact is neither expressly stated nor necessarily implied from the facts that are stated, the title must be considered as defective and judgment must be arrested.*

Chitty, in his work on Pleading, 14 Am. ed., 383, thus states the rule:

> "The declaration will be defective if it does not show that by express contract or by implication of law in respect to the defendant's particular character or situation, etc., stated by the plaintiff, the defendant was bound to do or omit the act in respect to which he is charged."

And again (p. 385): "The particular situation of the defendant, from which his duty and liability arise, must be concisely stated," citing—

Max *vs.* Roberts *et al.*, 12 East., 93.
The King *vs.* Everett, 15 E. C. L., 64.

In an action against an overseer of highways for not repairing a bridge, whereby the plaintiff was injured, the rule is thus stated:

> "The declaration in this case states generally that the overseer neglected his duty and willfully suffered a bridge to remain broken, by means of which the plaintiff sustained an injury. This was not enough. There is no special duty charged, nor are the facts stated from which a breach of duty is to be inferred. The mere fact that the defendant was an overseer of highways and that a bridge within his road district was out of repair gives no right of action. If the overseer had no money arising either from fines or commutation and no order, or if he had a contrary order in respect to the bridge from the commissioners, he was not guilty of a breach of duty, though he did willfully suffer the bridge to remain out of repair. He was under no obligation simply because he was overseer to repair the bridge. His obligation, if any, arose from the means he had in his power, and from which alone the law deduced his duty; but the declaration does not state the means, and therefore lays no foundation for the duty. This objection strikes me as fatal. The overseer ought to have had an opportunity by pleading to traverse the facts creating his particular and special duty to repair the bridge, but the plaintiff deprived him of that opportunity by omitting to state any such facts. Nor will it be sufficient to say that the facts creating his duty must have been shown upon the trial, and that we are now, after verdict, to presume so. The court are never to presume a cause of action, even after verdict, when none appears. . . . Suppose the declaration had only stated that it was the defend-

ant's duty to repair a certain bridge, and that by the neglect of such duty the plaintiff had lost a horse, but had omitted to state how it was his duty, and had not even stated him to have been an overseer, would that have been sufficient? Yet we might, with equal reason, presume, in that case, as in this, that the duty, whatever it was and from whatever quarter it arose, must have been made out at the trial, or a verdict could not have been rendered. Stating the defendant to be an overseer, without saying more, is not stating the duty."

Bartlett *vs.* Crozier, 17 Johns., L., 457.

"In actions to recover damages occasioned by the negligence of the defendant, it is a well-settled principle of pleading that the declaration must allege and show sufficient facts on which a duty is founded, which it is incumbent on the defendant to perform in respect to the rights and safety of the plaintiff. This is a fundamental principle of pleading, and the foundation of the right of action in such cases is the breach of duty shown. In the absence of facts to show such duty and a breach thereof, no cause of action is shown."

Hines *vs.* Gtn. Gas Co., 3 App. Cases, D. C., 369.

"The plaintiff must in his declaration give the defendant notice of what his complaint is. He must recover *secundum allegata et probata*. What is it that a declaration of this sort should state in order to fulfill these conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others. All that these declarations allege is, that defendants were possessed of land, and of a canal and cuttings intersecting the same, and of certain bridges across the canal and cuttings communicating with and leading to certain docks of theirs; that they allowed persons going to and from the docks, whether

upon the business or for the profit of the defendant or not, to pass over the land; and that the deceased persons, in pursuance of and using that permission, fell into one of the cuttings and so met their death. The consequences of these acts are sought to be visited upon these defendants because they have allowed persons to go over their land, not alleging it to have been upon the business or for the benefit of the defendants or as the servants or agents of the defendants, nor alleging that the defendants have been guilty of any wrongful act, such as digging a trench on the land or misrepresenting its condition, or anything equivalent to laying a trap for the unwary passengers, but simply because they permitted these persons to use a way with the condition of which, for anything that appears, those who suffered the injury were perfectly well acquainted. . . . No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him."

Gantrel *vs.* Egerton, L. R., 2 C. P., 374.

"The declaration, it is true, charges negligence, carelessness, and improper conduct. Negligence alone will not do, unless some breach of duty is shown."

Collis *vs.* Selden, L. R., 3 C. P., 499.

In an action for damages for personal injury, it was alleged, in one of the counts, that the defendants were owners of a certain open and uninclosed lot of ground, and in another count, after alleging that there was a *public highway* across said lot, it was further alleged—not that the defendants cut the excavation (into which the plaintiff fell and was injured) and left it in a condition dangerous to persons passing along the highway—but that they permitted others to do so. On demurrer, it was held that the said counts were defective in not stating *how* the defendants permitted the act complained of. In disposing of this branch of the case the court say:

"There the allegation is, not that the defendants cut the excavation, and left it in a condition dangerous to persons passing along the highway, but that they *permitted* others to do so. How permitted? The sufficiency of this allegation turns upon the word 'permitted.' In what particular sense it was used by the pleader is altogether uncertain. It may be, for aught that appears on the face of these counts, that the defendants permitted the excavation by their mere silence and failure to interfere, or by not taking active measures to prohibit the making of the excavation over the lot and across the highway. Where there is a want of certainty in the allegation of a pleading the general rule is, that the sense of the averment is to be taken most strongly against the pleader (Chit. Pl., 237, 238); and giving to the defendants the benefit of this rule, the counts under consideration fail to state a sufficient cause of action."

Maenner *vs.* Carroll *et al.*, 46 Md., 215.

"The complaint, instead of stating facts and circumstances to show that it was the duty of the defendant to erect and keep up lights, guards, and barriers while the pit remained open, assumes that such was his duty and proceeds at once to allege a breach of this duty. The difficulty is the want of any statement of facts from which the duty arises, for an allegation of the duty is of no avail unless from the rest of the complaint the facts necessary to raise the duty can be collected."

City of Buffalo *vs.* Holloway, 7 N. Y., 498.

Applying these rules to the case at bar, it will appear that there is no cause of action here against the Baltimore and Potomac Railroad Company. The sole and only duty charged upon that company is so to "conduct and manage the said . . . train of steam cars as to *avoid danger* to the passengers in said street car." It must be assumed that this was done, for the reason that no breach of that duty is averred.

No duty is charged upon that company in respect of the erection and maintenance of gates at the street crossing. Even assuming that the "gatekeeper" was a servant of the Baltimore and Potomac Company, it still does not appear that he had any specific duty to perform and failed in the performance of it. The averment is that he "negligently allowed" something to be done which resulted in injury to the female plaintiff. It might well be asked, as was done by the Maryland court in Maenner *vs.* Carroll, how "allowed"? Was it his duty to prevent the occurrence complained of? Did his wrong consist in "mere silence and failure to interfere," or in "not taking active measures" to stop the driver of the street car before he drove "partly beneath the said gates"?

It is not necessary to apply the general rule that "the sense of the averment is to be taken most strongly against the pleader," for even after resolving all doubts here in favor of the pleader the declaration fails to state any cause of action against the Baltimore and Potomac Company.

It remains but to notice, on this branch of the case, if the insufficiencies of the declaration are cured by the verdict.

The court below bases its decision, overruling the motion in arrest of judgment, mainly upon the ruling of this Court in Lincoln against Iron Company, 103 U. S., 412. That action was brought upon certain bonds issued by the township of Lincoln, as was alleged, "acting under and in accordance with the authority conferred upon it by said act of legislature," previously mentioned in the declaration. The defendant pleaded the general issue and gave notice of several special defenses. Among these there was one to the effect that there had never been an election, called and held as required by law, to authorize the issue of bonds. This Court, in disposing of the case, says:

> "Now, if the township could only make the donation alleged by way of an election duly held, it was

> the duty of the court below to require proof of this fact, as well as of the other facts necessarily involved in the issue as made, and it will be presumed that this was done. What proof was sufficient for this purpose it is not necessary to decide, as no exception was taken on this point."

No erroneous rulings at the trial were complained of by the defendant, the principal question raised by the assignment of errors being as to the sufficiency of the first and second counts of the declaration. This, as this Court held, set up a *prima facie* cause of action, as must be apparent at a first glance. If any of the prerequisites of a valid bond issue were omitted, that clearly would constitute matter of defense, but the bond sued on was "held binding according to its terms and conditions apparent on its face and until the contrary be shown."

Reliance was also placed in the court below upon the citation from 1 Wms. Saund., 228, to the effect that if "the supposed defect in the declaration is but a defective statement of a good cause of action, and not the statement of a defective or insufficient cause of action, the verdict cures the defect."

But, as has been shown, the declaration in this case sets up no cause of action whatever as against the Baltimore and Potomac Railroad Company, and the court cannot presume that the plaintiffs had a good cause of action where such cause is not averred in the declaration.

> "It is not upon the evidence, but upon the pleadings and evidence applicable to the pleadings, that a plaintiff can recover in any case. It is therefore always necessary that the declaration should set out a good and sufficient cause of action, to be judged of by the court; otherwise it is vain to look to the evidence in the cause, upon which there can be no recovery without a case made in the declaration."
>
> Turner *vs.* Walker, 3 Gill & Johnson, 388.

The sole and only duty charged upon the Baltimore and Potomac Railroad Company is to so conduct and manage its train of steam cars as to "*avoid danger* to the passengers in said street car." Without commenting upon the unreasonableness of such an averment, for the movement through a city of locomotive engines is always more or less dangerous, and street cars should keep out of the way, suffice it to say that no breach of this duty is alleged.

> "Nor will it do to say that the facts creating the duty must have been shown upon the trial, and that we are now, after verdict, to presume so. The courts are never to presume a cause of action, even after verdict, where none appears."
>
> Bartlett *vs.* Crozier, *supra.*

Phillips thus states the rule:

> "The declaration is the foundation of the suit and judgment. It must simply and fully explain the plaintiff's case and contain all the matters essential to entitle him to judgment. Whatever it is necessary to prove must be alleged."
>
> Phillips on Evidence, 161.

In Seymour *vs.* Maddox, 71 E. C. L., 326, the plaintiff recovered a verdict in an action for alleged negligence on the part of defendant, but a rule in arrest of judgment was made absolute because the facts stated did not set up the duty a breach of which was complained of.

But the point would seem to be concluded by the decision of this Court in Pollard *vs.* Lyon, 91 U. S., 225. That was an action for slanderous words spoken, "whereby the plaintiff has been damaged and injured in her name and fame." The plaintiff recovered a verdict, but judgment was arrested because the declaration did not set up the special damage she had "suffered by the false speaking of the other party."

In that case, as in this, the point was made that the "supposed defect in the declaration is but a defective statement

of a good cause of action," and that it was cured by the verdict, but the point was not sustained.

The averments of the declaration are not aided by the concluding clause—that the injuries were "occasioned by the gross carelessness and neglect of the defendants and each of them." Such an allegation is too general to support any evidence.

> The Jeffersonville, etc., R'w'y Co. *vs.* Dunlap, 29 Ind., 426.

II.

IT WAS ERROR TO ADMIT EVIDENCE TENDING TO PROVE THAT THE GATEKEEPER WAS A SERVANT OF THE BALTIMORE AND POTOMAC RAILROAD COMPANY.

The word "gatekeeper" occurs but once in the declaration, but it is not averred that he was the servant of either of the defendants. There is a suggestion (it can hardly be called an averment) that he was "operating the gates or guards at said crossing which were erected for the purpose of preventing damage to vehicles and foot passengers," but there is nothing to indicate by whom they were erected, or whose duty it was to operate them when erected. Had it been charged that he was the servant of one or the other of the defendants, the averment might have been put in issue and evidence adduced to show that he was an employé of the District of Columbia, or some humane society or of one of the other railroad companies using the tracks.

> "It is well settled that whatever is to be alleged in pleadings must be set forth with certainty, and not in doubtful or ambiguous terms; and that when an averment is susceptible of different meanings, that construction shall be adopted which is most unfavorable to the party pleading."
>
> Murphy *vs.* Preston, 5 Mackey, 516.
> Maenner *vs.* Carroll, *supra.*
> Towson *vs.* Bank, 6 H. & J., 54.

The court below adopted the construction which was most unfavorable to the Baltimore and Potomac Company, thus reversing a well-established rule. The error in this seems so manifest as not to require further comment.

III.

THERE WAS NO EVIDENCE OFFERED FROM WHICH THE JURY COULD PROPERLY FIND THAT THE GATEKEEPER WAS AN EMPLOYÉ OF THE BALTIMORE AND POTOMAC RAILROAD COMPANY, AND THE QUESTION SHOULD NOT HAVE BEEN SUBMITTED TO THEM.

The only witness who testified with regard to the erection and maintenance of the gates or the employment of the gatekeeper was McKeever, trainmaster of the Baltimore and Potomac Railroad Company (R., p. 44). He did not know by whom they were erected, and was not positive by whom they were operated in the year 1889. He further testified, against objection, that the gatekeeper was under the charge of the supervisor of tracks of the Baltimore and Potomac Railroad Company. (R., p. 46.)

On cross-examination he testified that he did "not know whether the gatekeeper was employed on the 10th of August, 1889, by the Alexandria and Washington, or the Alexandria and Fredericksburg, or the Baltimore and Potomac Railroad Company." All three of these companies used the Maryland Avenue track at that time. These roads were under the same management, but were separate and distinct corporations. He further testified, under cross-examination, as follows: "I do not know by which one of these three companies the gateman was employed." (R., p. 47.)

Although this witness did not know by whom the gateman was employed, the court permitted the jury to guess that he was an employé of the Baltimore and Potomac Rail-

road Company. They could equally as well have found from the evidence that he was an employé of the Alexandria and Washington Company or the Alexandria and Fredericksburg Company.

> "Where there is no evidence from which a presumption can legitimately be drawn, the question ought not to be submitted to a jury."
>
> Harris *vs.* Wilson, 1 Wendell, 511.
>
> Small *vs.* Smith, 1 Denio, 583.

IV.

IT WAS ERROR TO INSTRUCT THE JURY, AS WAS DONE IN PLAINTIFFS' FIRST PRAYER, THAT THEY WERE AT LIBERTY TO FIND THAT THE MEN IN CHARGE OF THE TRAIN "NEGLIGENTLY AND IMPROPERLY" MANAGED THE GATES.

There was not a scintilla of evidence to support any such finding. The men in charge of the train had nothing whatever to do with the gates, and in the nature of things they could not have. The facts proved showed that the gates were operated by the gatekeeper by an apparatus located near the sidewalk, some distance away from the tracks. Such language from the court must have had the effect of inducing the jury to imagine that there was some mysterious, though undisclosed, correlation between the trainmen and the gatekeeper for the management of the gates, making all alike responsible for their proper management.

As was well said by Mr. Justice Miller:

> "The jury were left by the court, and in fact told, to disregard the facts which were proved and indulge in the vagaries of their imagination in this the turning point of the case."
>
> Ward *vs.* The United States, 14 Wall., 39.

> "The submission by the judge to the jury of an hypothesis wholly unwarranted by the evidence is error for which a new trial will be awarded."
>
> Storey *vs.* Brennan, 15 N. Y., 524.

"It is erroneous to give an instruction based upon a state of facts, where there is no evidence tending to prove the same."

Andreas *vs.* Ketcham, 77 Ill., 377.

"The assumption by the court in its instructions to the jury that there is evidence before them from which they may find a material fact, when there is no such evidence, is prejudicial error and good ground for a new trial."

Newton Wagon Co. *vs.* Diers, 10 Neb., 285.

The error is all the more serious because of the shadowy character of the evidence tending to prove that the gatekeeper was an employé of the Baltimore and Potomac Railroad Company. But there was positive proof that the men in charge of the train were employed by that company, and for any negligence on their part resulting in injury the company would have been responsible.

V.

IT WAS ERROR TO INSTRUCT THE JURY, AS WAS DONE IN PLAINTIFFS' SECOND PRAYER, THAT THEY MIGHT FIND THAT THE ENGINE AND CARS OF THE STEAM TRAIN WERE CARELESSLY AND NEGLIGENTLY MANAGED BY THE PERSONS IN CHARGE THEREOF.

Here again is a proposition which has no evidence for its support. The jury were told by the court that no recovery could be had by the plaintiffs because of negligence, if any, on the part of the employés of the Baltimore and Potomac Railroad Company "in respect of the rate of speed of its steam train" (R., p. 68). This was tantamount to saying that the rate of speed, under the circumstances, was lawful and proper. With this element eliminated, there was an utter absence of evidence tending even to show that the persons in charge of the train were negligent or careless.

But two of these were mentioned, the engineer and fireman. Both were on the lookout, the engineer ready and able to stop his train within a distance of twenty feet by the application of air brakes which were connected with every wheel in the train, and no one was hurt by the steam train, notwithstanding the confusion that prevailed at the crossing at the time of the accident.

There being no evidence of negligence on the part of the trainmen, it was the duty of the court to so instruct the jury upon request of counsel for the Baltimore and Potomac Railroad Company, as was done in his prayer No. 2. (*R., p. 68.*)

> "When there is no evidence tending to prove a particular fact, the court are bound to so instruct the jury when requested."
>
> Greenleaf *vs.* Birth, 9 Peters, 292.

NOTE.—In August, 1889, the rate at which steam trains were permitted to run along the streets of Washington was *twelve* miles an hour. Section 15, article 10, of the Police Regulations of the District of Columbia was not then in force, as stated by counsel for the plaintiffs in the court below. (R., p. 44.)

VI.

THE COURT ERRED IN DEFINING THE DUTIES OF THE GATEKEEPER.

Stone, the gatekeeper, testified that it was his habit to begin lowering the gates when a train approaching from the west reached Ninth street. This gave an ample margin of safety. It took about thirty seconds to lower the gates. At the time of the accident to Mrs. Hickey he began to lower the gates when he saw the train "coming up by Ninth street" (R., p. 54). It was his duty to "watch the street and pavement and for vehicles." (R., p. 54.)

In this state of the evidence counsel for the Baltimore

and Potomac Railroad Company prayed the court to instruct the jury to the effect that "if the jury believe from the evidence that just before the accident to the female plaintiff the *gatekeeper started and was proceeding to lower the gates in time to let them completely down before the train approaching from the west reached Seventh street, and with reasonable and proper regard for the rights and safety of persons and vehicles using said street*, then the gatekeeper was not negligent in the discharge of his duty," &c.

The province of the gatekeeper was to give warning of the approach of a steam train for the *safety* of persons going up and down the street. At the same time such persons had a *right* to require that there should be no unreasonable detention; so the prayer provided that the gates should be managed with "reasonable and proper regard for the rights and safety of persons and vehicles using the street." The gatekeeper could do no more than this, and it is manifest error for the court to have refused to instruct the jury as so prayed.

Still graver is the error in the charge of the court defining the duty of the gatekeeper—"it was the duty of the gatekeeper to keep a strict watch for approaching trains of cars and to so manage the gates as to PREVENT street cars on Seventh street from passing onto the tracks of the Baltimore and Potomac Railroad Company when a train was approaching" (R., p. 77). The error of the court here is in assuming that the gates were, and were intended to be, a barricade, whereas they were merely a warning. There were no possible means whereby the gatekeeper could have *prevented* the driver of the street car from entering upon the steam-car track with the instrumentalities at his command—light arms of wood, called "gates," of three-quarter-inch white pine. He could only warn the driver to stop. He gave the warning, but it was not heeded.

Whether or not these gates were properly made was not

in controversy. No law was shown requiring their erection and no duty is charged in respect of their maintenance.

It remains but to notice on this branch of the case a serious misconception of the evidence, which finds expression in the opinion of the learned jurist who announced the conclusion of the District Court of Appeals, touching the number of times the gates went up and down at the time of the accident. It will be remembered that the lowering of these gates was not an instantaneous process; it took thirty seconds to completely lower them. This the gatekeeper was proceeding to do when the horses of the street car were found to be upon the steam-car track. He could not anticipate that the driver of the street car would not stop, as he should have done, in the face of the descending gates. They were quickly raised for the street car to pass and lowered again when it had cleared the steam-car tracks, so there were *two lowerings* of the gates—a circumstance that seems to have caused confusion on the part of several of the witnesses, as well as in the mind of the court below.

But the gates were not down as the street car approached. They could not have been, for Phillips, one of the plaintiffs' witnesses, had just driven through, traveling hurriedly northward. He met the street car about C street, less than fifty feet away, and looked round to see if it would attempt to cross in front of the approaching engine. So he "stopped to see which was going to beat, the locomotive or the street car," and he added, "The street car beat the locomotive." (R., pp. 39, 41.)

Another witness was similarly impressed. He testified:

> "The driver of the street car seemed to be running a race with the locomotive." (R., p. 37.)

And the driver testified:

> "I was about the center of the Belt Line car tracks, to the best of my judgment, when I first saw the steam train coming. I had no doubt of my ability

to get over the Maryland Avenue track in safety, and I did get over. When I first saw the steam train I cannot remember distinctly whether it was nearer Ninth street or nearer Eighth street." (R., p. 51.)

"I did not put on the brakes that morning until I got the bell. I suppose it was fifteen feet south of the Maryland Avenue tracks. It is impossible with a load of that kind to stop under ten feet after putting the brakes on, the car will slide some. I did not put the brakes on between C street and where I stopped south of Maryland avenue. I was going at my regular rate of speed. There was no stopping of my car on the line of the steam-car tracks. The draught or rise on the horses might have slackened them up a little bit. There is a little pinch there when you strike that crossing; I mean a little upgrade from C street to Maryland avenue." (R., p. 49.)

"I observed that the gates were up that morning. They were lowered after I went across. I know that by the bells in the gate. I did not see them lowered; there was no lowering in front of me. I did not see the gate come down in my rear at all. As a general rule, of course, I always watch the track; it is not my business to watch the gates as much as the tracks, because I have been driving for the past three or four years over the Baltimore and Ohio at H street all day long, back and forth. I looked and saw they were not down that morning, because I did not slack my speed at all. After I saw they were not down, I did not watch the gates." (R., p. 49.)

From all of which it is manifest that the driver of the street car was bent upon beating the locomotive engine, as he thought he could do without danger; that he did not stop his car or even slacken its speed, and that he did not see the descending gates. He did not consider it his "business to watch the gates as much as the track," and he was in no way embarrassed or confused by any action on the part of the gatekeeper.

But he must have thought it about time for the gates to

be coming down, because, as he says, "I wanted to get through before the gates came down" (R., p. 50). It was this anxiety on the driver's part that caused the commotion in the car, if it was not caused by Mrs. Hickey herself in jumping from the car when there was no danger impending. It was the driver's duty "to look carefully to see whether the gates were descending" before attempting to cross the steam-car tracks. Had he done so—and he admits that he did not—all possibility of commotion would have been avoided, for he would, or should, have applied the brakes and stopped his car.

> "Carriers of passengers are required to use all means that vigilance and foresight can reasonably exercise, in view of the character and mode of conveyance adopted, to prevent accidents to passengers."
> Chicago, &c., R. R. Co. *vs.* Lewis, 145 Ill., 67.
> Chicago & A. R. R. Co. *vs.* Arnol, 144 Ill., 261.

> "A passenger upon a horse car having been injured by reason of a collision of the car with a steam-engine at a railway crossing, in an action against the horse car company and the steam car company charging concurrent negligence, the burden is upon the horse car company to show proper care."
> Central Passenger R. R. Co. *vs.* Kuhn, 86 Ky., 578.

Tested by these rules, and in view of the admissions of the driver of the street car, it was palpable error for the court to instruct the jury that it was the duty of the gatekeeper to *prevent* the street car from entering upon the steam-car track in front of the approaching train.

VII.

IT WAS ERROR TO INSTRUCT THE JURY THAT THE PLAINTIFFS MIGHT RECOVER IF THEY FOUND FROM THE EVIDENCE THAT THE FEMALE PLAINTIFF VOLUNTARILY JUMPED FROM THE CAR.

The declaration alleges that "the passengers in said street car, seeing the danger of impending collision and endeavoring to save themselves from the consequences thereof, rushed from said street car to a place of safety upon the ground, and in the confusion thereby created the female plaintiff, who was conducting herself in a careful and prudent manner, was pushed and shoved from her seat in said car and thrown violently to the ground," &c.

The case, as set forth in the declaration, is that the passengers in the car became panic-stricken, and in the confusion Mrs. Hickey was *pushed from* the car—that is, that the fear of an impending collision acting on the other passengers produced the injury.

This is the case the defendants were summoned to court to defend, and it was only this case they should have had to answer; but the testimony of some witnesses discovered a different state of facts from that alleged in the declaration.

One passenger in the street car testified:

> "I was sitting on the rear seat of the car. I did not notice Mrs. Hickey until she jumped. She was in the third seat ahead of me. She just jumped right up and right off. I jumped up and caught the bell just as she struck the ground. I was sitting on the same side that Mrs. Hickey jumped off. I heard nothing before Mrs. Hickey jumped, only people talking in the car." (R., pp. 59, 60, 61.)

Another passenger said:

> "I did not see any commotion in the car until Mrs. Hickey jumped or fell." (R., p. 63.)

Another passenger said:

> "I was on the car on the morning of this accident—on the front seat—the seat facing the passengers. I was facing north. I heard a lady scream, get up, and jump out. I was facing her. She was right in front of me. She jumped towards the east, the same side she was sitting on. I am certain the lady jumped out. After I saw Mrs. Hickey jump, I turned and looked in the direction of the driver. I saw Mrs. Hickey after she was on the ground I did not know what the matter was, but turned round and saw the gates coming down." (R., pp. 64, 65.)

The Baltimore and Potomac Railroad Company prayed the court to grant the following instruction:

> "8. If the jury believe from the evidence that the female plaintiff voluntarily jumped from the car in which she was riding, as testified to by witnesses in behalf of the defendants, the plaintiffs are not entitled to recover under the issues joined in this cause." (R., p. 70.)

And the Washington and Georgetown Railroad Company asked substantially the same instruction; but the court refused to give it. The jury were virtually instructed that whether Mrs. Hickey, under a reasonable apprehension of an imminent collision, jumped off the car to avoid injury, or was thrown off by other passengers in a similar state of mind, made no difference. (R., pp. 73, 74, 75.)

We have here two distinct ideas, two conceptions, of the case—one that of fear acting on the other passengers, and one that of fear acting on Mrs. Hickey. The declaration alleges the first, and the court tells the jury in either case the finding of the jury should be the same. The defendants were in court to answer the first theory—the one set out in the declaration—and after they had answered that the court made a new case for the plaintiffs by including the charge that the female plaintiff jumped by reason of the fear acting on her. This is not merely a verbal distinc-

tion. It involves the right of a court to broaden the case of a plaintiff by going beyond the pleadings.

The trial justice seems to have supposed that because under the law of negligence whether the injury was caused by Mrs. Hickey's jumping from the car voluntarily, and not as set forth in the declaration, or by her being pushed and shoved, as alleged, in either case the street railroad company was culpable, and therefore it made no difference which case was declared on and which proved. We submit, however, that the case to be tried is that made in the pleadings, and that no matter how clear another case may be, if it be not set forth in the pleadings, the court cannot try it.

Where the allegations in a petition charged death from a negligent defect in the *construction* of an elevator in which the deceased was riding at the time of the accident, it was held that proof of death resulting from negligence in the *operation* of the elevator did not support the allegations, and the variance was fatal.

O'Brien *vs.* Western Steel Co., 100 Mo., 182.

Here was an instance where the pleadings made one case and the evidence proved another, and the variance was necessarily held fatal. Whether death had been caused by negligent *construction* or *operation*, in either case the defendant was liable, but that liability availed the plaintiff nothing, because she had only declared on the negligent construction. Had the declaration been properly drawn she would have recovered in either case.

But the error in such ruling is far more serious than a mere variance between *allegata* and *probata*. It goes to the very essence of the right to recover. Mrs. Hickey herself insists and persists that she was pushed from the car and did not jump. She says on this point:

> "The steam car was coming and the people got very much excited and jumped up and in the con-

> fusion I was pushed off the car. When the gates were lowered I think the street car stopped. It tried to get through afterwards, which I heard it succeeded in doing. In the meantime I was pushed off the car" (R., p. 17). "It appears to me that it was a man who pushed me off the car" (R., p. 18). "I remember distinctly that I was pushed between the two gates. I am positive that I did not jump off that car, and that I was pushed off. It was either a man or a woman that pushed me off" (R., pp. 19, 20). "There was no jumping about it. I did not jump at all. I was pushed right off the car. I did not rise to get off. I was sitting perfectly still, waiting to get down to Seventh and D streets" (R., p. 20). "I was pushed off the east side of the car." (R., p. 22.)

And in response to a question by a juror she said:

> "When I was ejected from the car I was thrown through the passageway." (R., p. 22.)

These and similar expressions show that Mrs. Hickey saw no reason to jump; perhaps even did not see the approaching train or notice, possibly, that the street car was nearing the steam-car tracks; but, under the circumstances, the predicate of justification for jumping from the car could only have been a reasonable fear of imminent, impending peril. She felt none of this, for she says:

> "I was perfectly composed and entirely in command of my faculties. I distinctly remember everything that happened during that hour. I am positive that I did not jump off of that car, and that I was pushed off." (R., pp. 19, 20.)

So far as Mrs. Hickey knew, she was not placed in such a situation as obliged her to adopt the alternative of a dangerous leap or to remain at certain peril; and yet, notwithstanding her utter ignorance at the time of the supposed impending peril, her asseverations that she did not jump from the car—she saw no reason for doing so—the court in-

structed the jury that *if* they found "that the plaintiff Margaret and other passengers in said street car were under a reasonable apprehension that a collision was imminent, and while under such apprehension and in a reasonable manner the plaintiff Margaret jumped from the car in an effort to avoid danger," &c. (R., p. 67). The jury could not possibly find from the evidence of Mrs. Hickey, who, of all the witnesses examined, alone knew of her fears at the time, that she was under any apprehension of danger, and such an apprehension on the part of the other passengers would not have justified her in jumping. She was without fear at the time, and therefore if she jumped from the car *voluntarily* it could not have been with any purpose of thereby avoiding a more serious peril. From all thought of such peril, according to her own testimony, she was entirely free.

How, then, could the jury find from the evidence "that the plaintiff Margaret . . . was under a *reasonable apprehension* that a collision was imminent, and while under such apprehension . . . the plaintiff Margaret jumped from the car?"

> "An instruction which assumes the existence of facts of which there is no evidence is misleading and erroneous."
>
> Jones *vs.* Randolph, 104 U. S., 108.

For these reasons it is respectfully submitted that the judgment against the Baltimore and Potomac Railroad Company was wrong and should be reversed and the case remanded to the court below with instructions to grant its motion in arrest of judgment.

SAMUEL MADDOX,
Attorney for the B. & P. R. R. Co.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

No. 253.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY AND THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

MARGARET L. HICKEY AND JOHN P. HICKEY, HER HUSBAND.

Brief for the Washington and Georgetown Railroad Company, Plaintiff in Error.

W. D. DAVIDGE,
W. D. DAVIDGE, JR.,
Attys. for W. & G. RR. Co.

LAW REPORTER PRINT.

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THE CASE.

The defendants in error, Margaret L. Hickey and John P. Hickey, her husband, sued the appellants for an injury to Margaret L. Hickey by reason of the negligence of the Washington and Georgetown Railroad Company and The Baltimore and Potomac Railroad Company. The former company, a common carrier of passengers for hire, operated by means of horse-power, a line of street railway on Seventh street west, running north and south, and crossing Maryland avenue; and the latter company, a common carrier for hire of passengers and freight, ran a steam railroad, east and west, over and along Maryland avenue. These two lines of railroad crossed each other at the intersection of Seventh

street west and Maryland avenue. At this point, to keep pedestrians and vehicles using Seventh street off the steam tracks when there was danger from passing trains, the steam railroad company maintained gates (R. 46), the usual contrivance, consisting of wooden arms which, by means of a crank (R. 41), or cranks (R. 53), could be lowered simultaneously from an upright position across the highway of Seventh street (R. 41, 53). The cranks were managed by a gatekeeper, who was an employee of The Baltimore and Potomac Company (R. 46), and whose duty it was to lower the gates when a train was approaching. The gates were also provided with fall-backs which, when the gates descended, fell across the sidewalks very much as the gates proper fell across the street (R. 54). The gates were situated one on the north side and one on the south side of the steam tracks, about twelve and a half feet apart (R. 48). It required only a few seconds to lower the gates, and about the same time to raise them (R. 55, 56).

The negligence was specifically alleged in the declaration and is as follows:

Margaret L. Hickey, on the morning of the 12th of August, 1889, was a passenger on one of the cars of the street railway company on the Seventh street line going south towards Maryland avenue.

> "As said street car approached said crossing the gatekeeper who was operating the gates or guards at said crossing, which were erected for the purpose of preventing damage to vehicles and foot passengers, negligently allowed the driver of said street car to drive the same partly beneath the said gates and partly over and across the tracks of The Baltimore and Potomac Railroad Company; and the plaintiffs further aver that the driver of said street car so negligently and carelessly conducted and managed his said car that before said street car could entirely cross said tracks the said gates were suddenly lowered upon said street car, [a] train of steam cars approaching rapidly all the while, and

> the passengers in said street car, seeing the danger of impending collision and endeavoring to save themselves from the consequences thereof, rushed from said street car to a place of safety upon the ground, and in the confusion thereby created, the female plaintiff, who was conducting herself in a careful and prudent manner, was pushed and shoved from her seat in said car, and thrown violently to the ground" (R. 2, 3).

The evidence shows that the street car, an open summer car full of passengers (R. 31), was proceeding down Seventh street at the ordinary rate of speed for such cars (R. 31, 49, 52), and as the street car neared the steam track an east-bound steam train, running at the rate of five or six miles an hour (R. 56), approached the intersection of the tracks, and when the street car had almost reached the north rail of the steam track, when the horses were within ten or twelve feet (R. 35) of the steam track, as the gateman testified, the gateman suddenly came out of his box, apparently hastily awakened, immediately began to lower the gates and put them down, the north arm just in front of or near the manes of the horses (R. 21, 33). The gates were immediately raised (R. 54) and the car proceeded to cross the steam track, when the gates were suddenly lowered again, no one knows why, the south arm this time falling between the car and the horses and penning the car in on the steam track (R. 21, 22, 30, 32, 33, 34). The passengers, seeing themselves thus shut in and the approaching steam train coming down upon them, naturally became excited and a commotion ensued, in consequence of which Mrs. Hickey either was pushed, as she says, or jumped, according to some of the evidence, from her seat in the car and was injured (R. 19, 30, 32, 33). The car could have gotten across in safety (R. 50, 51), and but for the second lowering of the gates the commotion would not have occurred.

It is clear from the evidence that the commotion was the cause of the injury, and was caused in turn by the second

lowering of the gates and the holding of the car upon the steam track, and it is also clear that the street railroad could not have in any way foreseen that the gateman would lower the gates a second time.

The jury found for the plaintiffs, defendants in error, and assessed the damages at twelve thousand dollars, of which six thousand were remitted as a condition precedent to the overruling of a motion to set aside the verdict and grant a new trial. Judgment was entered against the defendants, the plaintiffs in error appealed to the Court of Appeals of the District of Columbia which affirmed the judgment of the court below; and from the judgment of the Court of Appeals the case is brought here by writ of error (R. 93).

ASSIGNMENT OF ERRORS.

1. The Court of Appeals of the District of Columbia erred in affirming the judgment of the Supreme Court of the District of Columbia.

2. The trial court erred in refusing to instruct the jury that the negligence charged against the defendants consisted in the breaches of duty *specifically alleged*, and that they were not at liberty in this action to consider any other negligence (R. 70, 72).

3. The trial court erred in refusing to instruct the jury, as prayed by counsel for the Washington and Georgetown Railroad Company, that if they should find that the rush of passengers and consequent confusion alleged, which led to the plaintiff being pushed or shoved from the car, as alleged, was *caused by the sudden lowering of the gates upon the street car*, as testified to in behalf of the plaintiffs, and that *such lowering of the gates was an act of negligence on the part of the gatekeeper*, the servant of the Baltimore and Potomac railroad, but that the agents of the Washington and Georgetown Railroad Company *did not know and had no reason to*

believe that the gates would be so lowered, then the latter defendant was *not responsible for such negligence.* It was not responsible for the negligence of the said gatekeeper and was not called upon to anticipate such negligence (R. 70, 72).

4. The trial court erred in refusing to instruct the jury, as prayed by counsel for the Washington and Georgetown Railroad Company, that if they found that *the injury to the plaintiff was caused by her being shoved or pushed from the car in the rush of passengers and confusion resulting from the sudden lowering of the gates*, as mentioned in the last paragraph (2), *there was no evidence that the conduct and management of the street car entered into or contributed to the negligence of the gatekeeper*, and the verdict of the jury must be for the Washington and Georgetown railroad (R. 71, 72).

5. The trial court erred in refusing to instruct the jury, as prayed by counsel for the Washington and Georgetown Railroad Company, that if the jury should find that the street car could and *would have passed the steam track without injury* to the plaintiff *except for the lowering of the gates* upon said car after they had been raised to allow the car to pass over the steam track, and that the *said lowering was the cause of the injury* to the plaintiff and was *an act of negligence on the part of the gatekeeper*, then the Washington and Georgetown railroad was not responsible for such injury, and the verdict of the jury must be in its favor (R. 71, 72).

6. The trial court erred in refusing to instruct the jury, as prayed by counsel for the Washington and Georgetown Railroad Company, that if they should find that the injury to the plaintiff was caused by her *jumping from the car voluntarily, and not as set forth in the declaration*, the plaintiffs were not entitled to recover. The declaration did not aver that the injury was caused by her own act, impelled by sudden alarm and to avoid imminent danger, and her own evidence was to the contrary (R. 71, 72).

7. The trial court erred in refusing to instruct the jury,

as prayed by counsel for the Washington and Georgetown Railroad Company, that if they should find that the *injury to the plaintiff was the result of the negligence of the gatekeeper* in the management of the gates, the agent of The Baltimore and Potomac Railroad Company, *and but for such negligence would not have been sustained by the plaintiff*, and that the Washington and Georgetown Company, through its agents in charge of the street car, *did not know and had no reason to believe that the said gatekeeper would be negligent*, then the plaintiffs were not entitled to recover against the latter company (R. 71, 72).

8. The trial court erred in instructing the jury that if they should find that the *injury to the plaintiff was the result of the negligence of the gatekeeper* in the management of the gates, if they should find that he was the agent of The Baltimore and Potomac Company, *and but for such negligence would not have been sustained* by the plaintiff, and that the Washington and Georgetown Railroad Company, through its agents in charge of the street car, WAS NOT NEGLIGENT IN DRIVING THE STREET CAR ON SAID STEAM-CAR TRACK and *did not know and had no reason to believe that the gatekeeper would be negligent*, then the plaintiffs were not entitled to recover against the latter company (R. 71, 72, 75).

9. The trial court erred in instructing the jury that if they found for the plaintiffs they *might assess the damages at any sum within the limits of the sum claimed in the declaration* (R. 80).

POINTS.

I.

Although a person may be negligent, he is only responsible for injury proximately resulting from such negligence; and if another agency intervenes of itself sufficient to stand as the cause of the injury the first is too remote.

This point relates only to the Washington and Georgetown Railroad Company.

It is clear that the cause of the injury was the commotion. How was this commotion caused? There is evidence to show that when the street car approached and went upon the steam track the gates were up, and there is also evidence to show that the gates were first lowered hurriedly by the gateman, and that when he saw he was too late and the gates had descended on the horses, he immediately raised them and the car proceeded on to the steam track. There is no pretension, however, that the first lowering of the gates (if there were two lowerings) caused the accident.

Mrs. Hickey herself swears positively that she was pushed off the car between the two gates; that she remembers rolling off the steam track; that the gates were lowered as the street car approached; that the gates were raised to let the car pass, and that then the gates were lowered again, and it was just there, at the second lowering, that she was pushed off (R. 21, 22). She occupied the third or fourth seat from the front of the car (R. 17, 21, 22), and the first time the gates descended the car was on the north side of the north gate. The length of a car is twenty-two feet, and there are seven seats twenty-four inches apart (R. 62). Mrs. Hickey was probably at least ten feet from the front of the car.

A passenger on the car testifies:

> "Just as the car got on the track the gate came down and across the hips of the horses, and the car stopped right still. The horses passed under, but the car did not. Both gates came down together; they were up when the horses reached it. The gate

> came down and stopped the horses, and the very minute the car stopped it caused me to look out. When the car passed through, the north gate was up. It had hoisted up again for the car to pass through; it let down again just as the horses came through. The driver stopped the horses. When the horses were going through they lowered the gate and cut the car off like. The first gate we came to came down just as the horses got across the steam track. The horses were inside the gate, and the car was shut out on this side of the gate on the steam-car track. At that moment everybody screamed out—just at that moment. Before the gate was lifted everybody tried to rush out of the car. The car was on the track; the horses were inside. The second arm of the gate near the river had come down on the hips of the horses" (R. 30).

Another witness, who was standing on the corner of Seventh street and Maryland avenue (R. 32), says:

> "The man let the gates down on the car. The horses had gone through. The horses were on the side of the river from the track, and the car between the gates. Just at that time, when everybody saw the train approach, everybody hollered. . . . The horses were on the side next to the river, and the car was between the gates. Then the people hollered and all made a rush" (R. 32, 33).

Another passenger in the street car at the time of the accident testified:

> "As we were going down at Seventh street and Maryland avenue the gates were lowered. The street car stopped. Then the gateman raised the gates again, and, of course, the car started through, and just as it got into the middle of the gates he commenced lowering them down again. Then they all jumped up in the car and some one cried out the train was coming. . . . The north arm of the gate came down just before the car got through, and then it was lifted. The gates were lowered first and

> the car stopped. Then they were lifted again and lowered again when the car was on the steam-car track. I think they caught the horses in the gate, though I do not know exactly how. I think the south gate caught the hindquarters of the horses, and the other gate was on the body of the car. . . . When the gates came down the second time, on the hips of the horses, I think they were obliged to stop; the car stopped. It was when the car stopped after the gates were let down on the horses or near the horses that the lady [Mrs. Hickey] came off the car and knocked against my arm" (R. 33, 34, 35).

In this state of the evidence the counsel for the Washington and Georgetown Railroad Company prayed the court to instruct the jury to the effect that *if* the jury should find from the evidence that the rush of passengers and consequent confusion alleged, which led to the plaintiff being pushed or shoved from the car, as alleged, *was caused by the sudden lowering of the gates* upon the street car, as testified to in behalf of the plaintiffs, *and that such lowering of the gates was an act of negligence* on the part of the gatekeeper, the servant of The Baltimore and Potomac Railroad Company, *but that the agents of the street railway company did not know and had no reason to believe that the gates would be so lowered*, then the latter company was not responsible for such negligence. It was not responsible for the negligence and was not called upon to anticipate such negligence (R. 70).

And another instruction was prayed, that *if the injury* to the plaintiff *was caused* by her being shoved or pushed from the car in the rush of passengers and confusion resulting *from the sudden lowering of the gates as mentioned* in the above prayer, there was no evidence that the conduct and management of the street car entered into or contributed to the negligence of the gatekeeper, and the verdict of the jury, if they found the injury was so caused, must be in favor of the Washington and Georgetown Railroad Company (R. 71).

Still another instruction was prayed, that *if* the jury

should find that the steam car *could and would have passed the steam track without injury* to the plaintiff *except for the lowering of the gates* upon said car after they had been raised to allow the car to pass over the steam track, *and that the said lowering was the cause of the injury* to the plaintiff, *and was an act of negligence on the part of the gatekeeper, then the street car company was not responsible for said injury*, and the verdict of the jury must be in its favor (R. 71).

Still another instruction was prayed, embodying the same proposition: that *if* the jury found the *injury* to have been *the result of the negligence of the gatekeeper in the management of the gates*, the agent of The Baltimore and Potomac Railroad Company, *and but for such negligence would not have been sustained* by the plaintiff, and that the Washington and Georgetown Railroad Company, through its agents in charge of the street car, *did not know and had no reason to believe that the gatekeeper would be negligent*, then the plaintiffs were not entitled to recover against the latter company (R. 71).

The gist of all of which instructions is that no matter whether it were negligence or not for the street car company to drive its car upon the steam-car track, yet *if* the jury found that *it was the lowering of the gates* (and not the negligence, if it were such, in going upon the steam track) *that caused the injury, then they should find for the street car company.* The postulate of the instructions is that it was the lowering of the gates that caused the injury.

The court refused to give *any* of these instructions. It did, however, in one of the instructions actually given (the 9th, R. 71), incorporate a similar idea, but in the same prayer superadded to the proposition a qualification which destroyed it. The court instructed the jury that if from the whole evidence they should find that the injury to the plaintiff was the result of the negligence of the gatekeeper in the management of the gates, if they should find that he was the agent of The Baltimore and Potomac Railroad Company, and but for such negligence would not have been sus-

tained by the plaintiff, and that the Washington and Georgetown Railroad Company, through its agents in charge of the street car, WAS NOT NEGLIGENT IN DRIVING THE STREET CAR ON SAID STEAM-CAR TRACK, and did not know and had no reason to believe that the said gatekeeper would be negligent, then the plaintiffs are not entitled to recover against the latter company (R. 71, 72).

The court was asked to instruct that if the injury was caused by the negligence of the gatekeeper, the street car company was not liable, whether it was negligent or not in going on the steam tracks, provided, of course, it could not have foreseen the negligence of the gatekeeper; and the court instructed that *even if the injury had been caused by the negligent lowering of the gates, and the street car company could not have foreseen such negligence, that even then the street car company would be entitled to a verdict* ONLY ON THE HYPOTHESIS THAT THE COMPANY WAS NOT NEGLIGENT IN DRIVING ITS CAR UPON THE STEAM-CAR TRACK (R. 75) All the Washington and Georgetown Railroad Company asked was that if the jury found as a fact that the lowering of the gates was the proximate cause of the injury, that then they might bring in a verdict in accord with their belief; but, under the instructions given by the court, the jury could not do this *unless they also found that there was no negligence in driving the street car upon the steam car track.* It may be said that the approaching train was the cause of the commotion and the consequent injury; if this were so, the jury could have found accordingly. The court was *not* asked to *instruct the jury to find a fact,* but *if they found a fact,* then there was a certain legal consequence.

The law on this point is well settled.

If a new force or power has intervened of itself *sufficient* to stand as the cause of the misfortune, the other must be considered as *too remote.*

Insurance Co. *v.* Tweed, 7 Wal. 44, 52.
Milwaukee RR. Co. *v.* Kellogg, 94 U. S. 469, 475.
Scheffer *v.* Railroad Co., 105 U. S. 249, 252.

"If," says Thompson, "A is guilty of a *negligent* act which would not have produced the catastrophe but for the *subsequent intervening negligence* of B, such negligence of B *not being a result which A might reasonably anticipate, nor one against which it was his duty to guard, A will not be responsible* for the resulting damages. But an intervening act of an independent voluntary agent does not arrest causation nor relieve the person doing the first wrong from the consequences of his wrong *if such intervening act was one which would ordinarily be expected to flow from the act of the first wrong-doer.*"

2 Thompson on Negligence, 1089.

Judge Cooley in his work on torts says:

"If the original act was *wrongful* and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are *not wrongful*, the injury shall be referred to the wrongful cause, passing by those which were innocent. *But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote.*"

Cooley on Torts, pp. 76, 77, second edition.

Shearman and Redfield lay down the rule as follows:

"If the *negligent* acts of two or more persons, *all being culpable and responsible* in law for their acts, do not concur in point of time, and the *negligence of one only exposes the injured person to risk of injury in case the other should also be negligent, the liability of the first in fault will depend upon the question whether the negligent act of the other was one which a man of ordinary experience and sagacity, acquainted with all the circumstances, could reasonably anticipate or not.* If such a person could have anticipated that the intervening act of negligence might, in a natural and ordinary

sequence, follow the original act of negligence, the person first in fault is not released from liability by reason of the intervening negligence of another. *If it could not have been thus anticipated, then the intervening negligent person alone is responsible.*"

1 Shearman and Redfield on Negligence, § 34, fourth edition.

"Negligence cannot ordinarily be said to be the proximate cause of an injury *when the negligence of another independent human agency has intervened and directly inflicted the injury.*"

16 Am. and Eng. Ency. 446.

So in Massachusetts.

Where a boy bought some gunpowder and, in the absence of his parents, put it in a cupboard in his father's house with the knowledge of his aunt, who had charge of him and of the house while his parents were away; and a week afterwards his mother gave him some of the powder and he fired it off with her knowledge; and some days later he took, with her knowledge, more of the powder out of the cupboard, fired it off and was injured by the explosion; it was held that the *injury was not the direct or proximate, natural or probable result of the sale of the powder*, and the seller was therefore not liable to the child for the injury.

Carter *v.* Towne, 103 Mass. 507.

And where a druggist sold an article, harmless in itself, *mistaking* it for another article, also harmless in itself, and afterwards another person intermixed the article so sold with another article, making thereby a dangerous explosive from which injury was suffered, it was held that there could be *no recovery against the druggist, because the sale was not the proximate cause of the accident.*

Davidson *v.* Nichols, 11 Allen, 514.

"If," says Thompson, "A is guilty of a *negligent* act which would not have produced the catastrophe but for the *subsequent intervening negligence* of B, such negligence of B *not being a result which A might reasonably anticipate, nor one against which it was his duty to guard, A will not be responsible* for the resulting damages. But an intervening act of an independent voluntary agent does not arrest causation nor relieve the person doing the first wrong from the consequences of his wrong *if such intervening act was one which would ordinarily be expected to flow from the act of the first wrong-doer.*"

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Cooley on Torts, pp. 76, 77, second edition.

Shearman and Redfield lay down the rule as follows:

"If the *negligent* acts of two or more persons, *all being culpable and responsible* in law for their acts, do not concur in point of time, and the *negligence of one only exposes the injured person to risk of injury in case the other should also be negligent, the liability of the first in fault will depend upon the question whether the negligent act of the other was one which a man of ordinary experience and sagacity, acquainted with all the circumstances, could reasonably anticipate or not.* If such a person could have anticipated that the intervening act of negligence might, in a natural and ordinary

sequence, follow the original act of negligence, the person first in fault is not released from liability by reason of the intervening negligence of another. *If it could not have been thus anticipated, then the intervening negligent person alone is responsible.*"

1 Shearman and Redfield on Negligence, § 34, fourth edition.

"Negligence cannot ordinarily be said to be the proximate cause of an injury *when the negligence of another independent human agency has intervened and directly inflicted the injury.*"

16 Am. and Eng. Ency. 446.

So in Massachusetts.

Where a boy bought some gunpowder and, in the absence of his parents, put it in a cupboard in his father's house with the knowledge of his aunt, who had charge of him and of the house while his parents were away; and a week afterwards his mother gave him some of the powder and he fired it off with her knowledge; and some days later he took, with her knowledge, more of the powder out of the cupboard, fired it off and was injured by the explosion; it was held that the *injury was not the direct or proximate, natural or probable result of the sale of the powder*, and the seller was therefore not liable to the child for the injury.

Carter *v.* Towne, 103 Mass. 507.

And where a druggist sold an article, harmless in itself, *mistaking* it for another article, also harmless in itself, and afterwards another person intermixed the article so sold with another article, making thereby a dangerous explosive from which injury was suffered, it was held that there could be *no recovery against the druggist, because the sale was not the proximate cause of the accident.*

Davidson *v.* Nichols, 11 Allen, 514.

Now, under the ruling of the trial court, both the vendor of the gunpowder in Carter *vs.* Towne, *supra*, and the druggist in Davidson *vs.* Nichols, *supra*, would have been liable for the injury. Both were negligent, and that fact, says the trial justice, is conclusive of the liability, no matter whether or not that negligence was the proximate cause of the injury.

So in Maryland.

Ryan *v.* Gross, 68 Md. 377.

Annapolis etc., RR. Co. *v.* Gantt, 39 Md. 115, 141, 142, 143, 144.

Phil., Wilm. & Balto. RR. Co. *v.* Stebbing, 62 Md. 504, 517.

Klipper *v.* Coffey, 44 Md. 117.

B. & O. RR. Co. *v.* Trainor, 33 Md. 542.

The last three Maryland cases are of contributory negligence, but a discussion of this branch of the law necessarily involves the law of proximate and remote cause. Indeed, perhaps, the basis of the rule of contributory negligence is the principle that the plaintiff's negligence is the proximate cause, and this view has been taken by a very eminent authority, Dr. Wharton.

Wharton on Negligence, § 300.

All the authorities agree that unless the plaintiff's negligence is a proximate cause at least of the injury, it is no defense.

1 Shearman & Redfield on Negligence, § 94, fourth edition.

Northern Central RR. Co. *v.* State, 29 Md. 420.

So in Pennsylvania.

Bunting *v.* Hogsett, 139 Pa. St. 363.

Pennsylvania *v.* Kerr, 62 Pa. 353.

Haverly *v.* State Line RR. Co., 135 Pa. St. 50.

West Mahanoy Township *v.* Watson, 116 Pa. St. 344.

See also Clemens *v.* Hannibal, &c., RR. Co., where it was held that where there was any doubt whether the loss to the plaintiff was the direct or natural result of the negligent act, that fact should have been submitted to the jury under proper instructions.

Clemens *vs.* Hannibal, &c., RR. Co., 53 Mo. 366.

Further illustrating this principle are cases where the act of God intervenes between the primary negligence and the result. Thus in Nebraska, where a railroad train was running three quarters of an hour *behind time* and was upset by a gust of wind, and plaintiff was injured. The wind did not extend to that part of the road where the train would have been if running on time. It was held that the *negligence of the company in running behind time was not the proximate cause* of the injury, and that it was not liable therefor.

McCleary *v.* Sioux City & Pacific RR. Co., 3 Neb. 44.

In this case the gust of wind was an intervening power or agency that *could not have been foreseen*, and therefore was not the natural result of the negligence of being behind time. For aught that the company could possibly see, promptness might have been quite as dangerous as delay.

Where water was used in the street to wash a van in violation of a statute, and the waste water was allowed to run down a gutter towards a grating leading to a sewer about twenty-five yards off. The grating was covered with ice, and in consequence the water flowed over a portion of the causeway and there froze. There was *no evidence* that the person using the water *knew the grating was obstructed.* The plaintiff's horse being led past the spot slipped on the ice and broke its leg. This was held *a consequence too remote to be attributed to the person unlawfully washing the van in the street.*

Sharp *v.* Powell, L. R. 7, C. P. 253.

But if a man negligently leaves a team of horses unhitched in a business street, and the horses run away and, after an attempt on the part of people in the street to stop them, run into another team, hitched properly at the side of the street, and the latter team runs away and injures a horse standing on the side of the street, the injury is the natural and proximate result of the owner of the first mentioned team. For *these consequences might have been foreseen.*

Griggs *v.* Fleckenstein, 14 Min. 81.

Cf. Bailiffs of Romney Marsh *v.* Trinity House, L. R.. 5 Ex. 204 (1870); in Ex. Ch. L. R., 7 Ex. 247 (1872),

So in England, the principal case being Clark *v.* Chambers, turning upon the point that the *injury* was a *probable consequence of the negligence* and *a result which ought to have been foreseen.*

Clark *v.* Chambers, 3 Q. B. Div. 327, 338, and cases therein cited.

The law is that however negligent a person may be, however negligently he may act, yet if another negligent human agency *intervenes* and the original wrongdoer *could not have foreseen such intervention and consequences therefrom, then the proximate cause of the result is the act of the intervening party,* and the first party is liable only for such consequences as would naturally flow from his conduct.

In the case at bar, if the street railroad company were negligent, then certain natural consequences would follow from the negligent acts, but the company cannot be made liable for the acts of outside parties *which it could not have foreseen.*

It may be contended that the real cause of the commotion was not the lowering of the gates, but the approach of the steam train. Just where the train was at the time of the accident is a matter of dispute. Mrs. Hickey says it appeared to be about forty or sixty feet off (R. 17), while the

driver of the car swears it was between Eighth and Ninth streets (R. 49), and the locomotive engineer in charge of the train and his fireman with him at the time say that it was at Ninth street that they noticed that there was some little excitement at the Seventh street crossing. A witness who was on the horse car says she saw the engine between Eighth and Ninth streets. She said it was there, "because it seemed to be so far off" (R. 63.) It is about five hundred and fifty feet from Seventh street to Ninth (R. 48).

The court below, however, it will be observed, was not asked to find the *facts* of intervening cause producing the injury, and the intervening cause not being a probable and natural result of the negligence of the street car company, these elements were to be left, very properly, to the jury.

It may be said that this is not a case of intervening cause, but one of concurrent negligence. But this is a question for the jury to decide. Whether or not one negligent person could have foreseen the negligent act of another is certainly not a question for a court. It was the province of the jury to say whether this was a case of concurrent negligence on one of intervening cause. The Washington and Georgetown Company merely asked that this question be submitted to the jury for their decision, but the trial court refused to grant the request, and ruled that if the jury found the company at all negligent in driving upon the steam car tracks, then no matter whether that negligence was the proximate cause of the injury or not, or whether or not the consequences of driving upon the steam car track might have been foreseen, still they could not find for the street car company.

In Milwaukee, etc., Railway Co. *v.* Kellogg, the sparks from a steam ferry boat had, through the negligence of its owner, the defendant, set fire to an elevator and the sparks from the elevator had set fire to the plaintiff's saw mill and lumber yard, which were from three to four hundred feet

from the elevator. The court was requested to charge the jury that the injury sustained by the plaintiff was too remote from the negligence to afford a ground for a recovery. Instead of this, the court submitted to the jury to find—

> "whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which under the circumstances would not naturally follow from the burning of the elevator, and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected."

The case having been brought here on exceptions, this court affirmed the judgment below, saying:

> "The true rule is, what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined *as a fact*, in view of the circumstances of fact attending it."
>
> Milwaukee, etc., Railway Co. *vs.* Kellogg, 94 U. S. 469, 474.

The trial justice, we submit, did not give the law to the jury when he instructed them that if the cause of the injury was the negligent management of the gates, and but for such negligence would not have been sustained by the plaintiff, and that *the street railway company was not negligent in driving upon the steam track*, and did not know and had no reason to believe that the said gatekeeper would be negligent, then the plaintiffs are not entitled to recover against the said company. Under these instructions, if the jury found the street railway *at all* negligent in going upon the steam tracks, they *could not find for it, even if they found the injury the result of the intervening agency and in no way a natural consequence of the company's negligence.*

It was asserted in the brief of the appellees below and the assertion may be repeated here, that the court left this ques-

tion to the jury when it charged them that if they believed there was ample time for the street car to cross over the steam-car track and that the gates were up as the street car approached, etc. (R. 77), that then they might find for the street car company. But this is simply saying that if there was no negligence this company is not liable. What was asked was an instruction showing how the company could be negligent and yet not liable for the injury caused by the negligence of some one else.

II.

The jury were instructed that if they found for the plaintiffs they might assess the damages at any amount they pleased within the limits of the sum claimed in the declaration, thirty thousand dollars. This misled the jury, and the verdict rendered was found by the court to be excessive.

The court below instructed the jury that if they found the plaintiffs entitled to recover they should award such damages, *within the limits of the sum claimed in the declaration*, as would fairly and reasonably compensate the female plaintiff for the pain and suffering caused to her by the injury which she sustained, and for the injury to her bodily health and power of locomotion, if any such they might find, which she had sustained in the past and would continue to sustain in the future as a natural consequence of said injury, and for such internal injuries and impairment to her physical health as they might find established by the evidence (R. 80).

This instruction amounted to a direct intimation to the jury that the finding of a verdict for the sum named in the declaration would not be excessive. Manifestly the jury were misled by it, for they brought in a verdict for the plaintiffs of twelve thousand dollars (R. 8), which the court

actually *found* to be excessive (R. 81), and which the court refused to set aside only on condition that the plaintiffs remit six thousand dollars (R. 81), which they did (R. 11).

A leading case on this subject is Bryan *vs.* Acee, where the court instructed the jury that they might find both actual and exemplary damages; that if they believed the plaintiffs were entitled to exemplary damages, that then the law left it to their discretion to say what the amount should be, and that they could find *any amount they thought proper, provided they did not go beyond the amount claimed in the declaration*, but that they should exercise this discretion not capriciously, but with prudence and wisdom. The jury found an excessive verdict. The Supreme Court of Georgia said:

> "A verdict for two thousand dollars [the amount named in the declaration] would, in our judgment, have been excessive, and yet the court charged the jury that if they should believe the plaintiffs were entitled to exemplary damages, the law left it to their discretion 'to say what the amount should be, and *they could find any amount they thought proper, provided they did not go beyond the amount claimed in the declaration.*' We *must* suppose that this charge of the court *exerted an influence* over the minds of the jury, as to the amount of damages, especially when they found a verdict for more than double the value of the property, proved by any witness. Believing that the charge of the court was wrong and to the injury of the party, we are bound to grant a new trial."
>
> Bryan *v.* Acee, 27 Ga. 87.

This was a case in which there was the element of exemplary damages; *a fortiori* this doctrine is applicable to the case at bar.

So in an action for a breach of promise of marriage, the trial justice charged the jury that if they found the agreement to marry, and breach by defendant, the plaintiff was entitled to a verdict.

> "As to the amount of recovery incident upon a

a breach of contract to marry, the *law leaves the question to the jury alone, restricting them only by confining them within the limits of the damages laid in the petition.*"

The Supreme Court of Texas held:

"It was the duty of the court to have given in charge to the jury the law of the case."

The rules for the measure of damages—

"should be deduced by the judge below from the allegations and evidence in the particular case. Instead of doing this in the case under consideration, the learned judge below *assumed substantially* in the first part of the charge, *not from the evidence, but from the pleadings, that the measure of damages was limited only to the gross amount claimed in the petition.* Although in the cases where the jury are properly instructed otherwise upon the measure of damages arising from the pleadings and evidence it may not be abstract error for the court to tell them that their verdict must not exceed the gross amount claimed in the pleadings, yet the *propriety of such a charge,* even in those cases, *is very questionable, as the jury are apt to take such an expression as an intimation upon the part of the court that the evidence would authorize a verdict for the full amount.* But when, without being otherwise instructed as to the true measure of damages, they are told, in effect, that the amount of their verdict is limited only by that claimed by the plaintiff, it is such *palpable error, calculated to mislead the jury,* as demands a reversal of judgment. If such were the rule, the important rights of parties would depend, not upon the oath of the jury to try the case according to the law and the evidence, but upon the mere arbitrary amount claimed in the petition. The charge in this case not only wholly failed to instruct the jury as to the legal measure of damages, but gave them an improper instruction on this point, which would, to some extent, have been corrected by the charges and refused. Under the charge as given, the jury could well have found, as probably they did, a verdict for exemplary damages."

Glasscock *v.* Shell, 57 Tex. 215.

Another case illustrating this principle was an attachment suit on a note of $385.89. The affidavit for the attachment charged the defendant with being "about to convert his property into money for the purpose of placing it beyond the reach of his creditors." The defendant admitted the note, but alleged that the attachment had been sued out wrongfully, maliciously, and without probable cause; that the plaintiffs were moved by malicious motives, and claiming damages for the injury to the goods while under seizure $1,500, also damages to his business, to his credit and standing as a merchant, and claiming as further damages $20,000.

The jury were instructed that if they should find that the attachment was maliciously sued out and without probable cause, that then they would be authorized to find for the defendant exemplary damages *not to exceed* $20,000.

The jury found for the plaintiffs the amount of the note and interest. They found for the defendant $1,084.50 actual damages, and $12,000 exemplary damages.

On appeal, the court, speaking of that part of the charge referred to above which allowed the jury to find for the defendant exemplary damages not to exceed $20,000, said:

> "Although it is common to use such expression as that objected to in the [instruction] in charges to the jury, and may be said to be authorized by that part of the pleadings in which the plaintiff alleges the amount of his damages, yet the practice is subject to objection. It is a well-known fact that it is the almost invariable rule with the pleader, as a mere matter of form, to place the general allegation of damages at an amount far exceeding any reasonable calculation. When, therefore, the jury are told that if they find for the plaintiffs, they are *authorized to give damages not exceeding the amount of formal damages there laid in the pleadings, they may take such an expression as an intimation upon the part of the court that the evidence authorized a verdict for the full amount claimed.*

> "Under our practice, the pleadings are always read to the jury, and they are thereby advised of the amounts claimed, and if, peradventure, they should now and then exceed this, the error can be easily corrected by a *remittitur*."
>
> Willis *v.* McNeill, 57 Tex. 465.

In regard to the latter part of the extract from this opinion, it may be added that in the case now under argument the trial justice read the declaration to the jury (R. 72).

III.

There is a variance between the declaration and proof, but the trial court goes beyond the pleadings and makes a new case for the plaintiffs.

The declaration alleges that—

> "the passengers in said street car, seeing the danger of impending collision and endeavoring to save themselves from the consequences thereof, rushed from said street car to a place of safety upon the ground, and in the confusion thereby created the female plaintiff, who was conducting herself in a careful and prudent manner, was *pushed and shoved* from her seat in said car and thrown violently to the ground," &c. (R. 3).

The case, as set forth in the declaration, is that the passengers in the car became panic-stricken, and in the confusion Mrs. Hickey was *pushed from* the car; that is, that the fear of an impending collision acting on the *other passengers* produced the injury. And in her testimony she said:

> "I was not very much excited by this accident. No one saw it who did not remark about the composure I exhibited at the time; I was perfectly composed and entirely in command of my faculties. I distinctly remember everything that happened during that hour. I am positive that I did not jump

off of that car and that I was pushed off" (R. 19, 20).

This is the case the defendants were summoned to court to defend, and it was only this case they should have had to answer. But the testimony of some witnesses discovered a different state of facts from that alleged in the declaration. One passenger in the street car testified:

> "I was sitting on the rear seat of the car; I did not notice Mrs. Hickey until she jumped; she was in the third seat ahead of me; she just jumped right up and right off; I jumped up and caught the bell just after she struck the ground; I was sitting on the same side that Mrs. Hickey jumped off" (R. 59, 60, 61).

Another passenger said:

> "I was on the car on the morning of this accident, on the front seat—the seat facing the passengers; I was facing north; I heard a lady scream: Get up, and jump out. I was facing her; she was right in front of me; she jumped towards the east, the same side she was sitting on; I am certain the lady jumped out; after I saw Mrs. Hickey jump, I turned and looked in the direction of the driver; I saw Mrs. Hickey after she was on the ground; I did not know what was the matter, but turned around and saw the gates coming down" (R. 64, 65).

The Washington and Georgetown Company prayed the court to grant the following instruction:

> "If the jury shall find from the evidence that the injury to the plaintiff was caused by her *jumping from the car voluntarily, and not as set forth in the declaration*, the plaintiffs are not entitled to recover in this action. The declaration does not aver that the injury was caused by her own act, impelled by sudden alarm and to avoid imminent danger, and her own evidence is to the contrary" (R. 71).

And the Baltimore and Potomac Company prayed substantially the same instruction; but the court refused to give it. The jury were virtually instructed that whether Mrs. Hickey, under a reasonable apprehension of an imminent collision, jumped off the car to avoid injury, or was thrown off by other passengers in a similar state of mind, made no difference (R. 73, 74, 75).

We have here two distinct ideas, two conceptions of the case—one that of fear acting on the other passengers, and one that of fear acting on Mrs. Hickey. The declaration alleges the first, and the court tells the jury in either case the finding of the jury should be the same. The defendants were in court to answer the first theory—the one set out in the declaration—and after they had answered that the court made a new case for the plaintiffs by including the charge that the female plaintiff jumped by reason of the fear acting on her. This is not merely a verbal distinction. It involves the right of a court to broaden the case of a plaintiff by going beyond the pleadings.

The trial justice seems to have supposed that because under the law of negligence whether the injury was caused by Mrs. Hickey's jumping from the car voluntarily, and not as set forth in the declaration, or by her being pushed and shoved, as alleged, in either case the street railroad company was culpable and, therefore, it made no difference which case was declared on and which proved. We submit, however, that the case to be tried is that made in the pleadings, and that no matter how clear another case may be, if it be not set forth in the pleadings the court cannot try it.

Where the allegations in a petition charged death from a negligent defect in the *construction* of an elevator in which the deceased was riding at the time of the accident, it was held that proof of death resulting from negligence in the *operation* of the elevator did not support the allegations, and the variance was fatal.

O'Brien *v.* Western Steel Co., 100 Mo. 182.

Here was an instance where the pleadings made one case, and the evidence proved another, and the variance was necessarily held fatal. Whether death had been caused by negligent *construction* or *operation*, in either case the defendant was liable, but that liability availed the plaintiff nothing, because she had only declared on the negligent construction. Had the declaration been properly drawn the plaintiff could have recovered in either case.

Moreover, this instruction assumed a state of fact to exist of which there was no evidence. There is in the record absolutely no evidence of a "reasonable apprehension." The testimony of Mrs. Hickey herself was that she was "perfectly composed and entirely in command of her faculties" (R. 19).

An instruction which assumes the existence of facts of which there is no evidence is misleading and erroneous.

Jones *v.* Randolph, 104 U. S. 108.

The other points relating to the case of this plaintiff in error have been so fully discussed in the brief of the Baltimore and Potomac Company that it is thought unnecessary to do more than merely adopt them.

In conclusion we submit that the judgment should be reversed as to both plaintiffs in error and certainly as to the Washington and Georgetown Railroad Company.

W. D. DAVIDGE,
W. D. DAVIDGE, JR.,
Attys. for W. & G. RR. Co.

MAR 30 1897
JAMES H. McKENNEY,
CLERK

166-521

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 253.

THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY AND THE BALTIMORE AND POTOMAC RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

MARGARET L. HICKEY AND JOHN P. HICKEY, HER HUSBAND.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

G. E. HAMILTON,
M. J. COLBERT,
For Defendants in Error.

LAW REPORTER PRINT.

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I.

STATEMENT OF CASE.

This is a writ of error to the Court of Appeals of the District of Columbia to review the judgment of that court affirming a judgment rendered in the Supreme Court of the District of Columbia in favor of the defendants in error in an action brought by them against the plaintiffs in error, to recover damages for personal injuries to the female plaintiff. Briefly stated, the facts are these: On August 12, 1889, the plaintiff in error, the Washington and Georgetown Railroad Company, was operating a line of street cars, drawn by horses, on Seventh street west, in the city of Washington, D. C., which intersected the single track steam railroad on

Maryland avenue southwest, operated by the Baltimore and Potomac Railroad Company. The crossing was guarded by automatic bars or gates, operated by a gatekeeper, who was in the employ of the Baltimore and Potomac Railroad Company. On the day in question, the female defendant in error, Mrs. Hickey, boarded one of the Seventh street cars at the junction of Seventh street and Pennsylvania avenue, and the car proceeded south until it approached the intersection of the steam railroad track. The evidence tended to show that at this point, and when the street car was a short distance north of the crossing, the gates were lowered and the street car stopped, as a train of steam cars was approaching the crossing from the west. Before the train reached Seventh street, however, for some unaccountable reason, the gatekeeper partially raised his gates and the driver of the car started across the track in front of the rapidly approaching train, and when the street car was directly on the railroad track, the gatekeeper again lowered his gates, one arm of the gate falling on the manes of the horses and pinning the car in between the two arms, causing the car to stop directly in front of the approaching engine, which was then only fifty or sixty feet away. The passengers in the street car became panic-stricken in the face of what seemed an impending collision, and in the confusion which resulted, Mrs. Hickey was pushed from the car and thrown to the ground, sustaining severe injuries, which have permanently crippled her. In the meantime the gates were raised a second time, the street car barely clearing the track when the engine and train reached the crossing.

There was a verdict and judgment in favor of the plaintiffs for $6,000—which judgment on appeal to the Court of Appeals of the District of Columbia was affirmed. The present writ of error is sued out to review that judgment. This brief is written as the case is about to be reached for hearing in this court, and as neither appellant has yet filed

any brief or assignment of error in this court, it becomes necessary for us to make this statement of the case and to discuss the exceptions appearing in the Bill of Exceptions.

II.

BRIEF OF ARGUMENT.

It was urged at the hearing in the Court of Appeals of the District of Columbia on behalf of the Baltimore and Potomac Railroad Company that the trial court erred as follows:

1. In refusing to grant the motion in arrest of judgment.
2. In admitting evidence tending to prove that the gatekeeper was an employee of the railroad company.
3. In refusing to direct a verdict in favor of the company.
4. In granting the first, second, and fourth prayers submitted by the plaintiffs in the trial court.
5. In granting the ninth prayer requested by the Washington and Georgetown Railroad Company.
6. In refusing to grant the prayers submitted by the Baltimore and Potomac Railroad Company, except prayers numbered 1 and 9.
7. In certain specified portions of the court's oral charge to the jury, where the court instructed the jury that the plaintiffs were entitled to recover if the jury found that the female plaintiff *jumped* from the street car to avoid impending danger, the declaration averring that she was *pushed* from the car.

We will discuss these several objections in the order above given.

First.

It is contended that the motion in arrest of judgment should have been granted. We submit this objection is

wholly without foundation. No demurrer was taken to the declaration, and indeed it seems to be conceded that the declaration does state a case of action. The only substantial ground urged for the motion was that no evidence was adduced at the trial showing negligence on the part of any employee of the steam railroad company, but it has been decided by this court that a motion in arrest can be sustained only where there is substantial error apparent on the face of the pleadings, and that the evidence offered at the trial is no part of the record for that purpose.

Bond *vs.* Dustin, 112 U. S. 604.

The general principle is stated in Evans' Practice, 331, that a motion in arrest of judgment can only be availed of where the facts averrrd by the plaintiff do not constitute a cause of action, or where the pleadings are insufficient in law to support the judgment. A motion in arrest of judgment is substantially a general demurrer to the declaration or other pleading, differing only from a demurrer in that it is interposed after verdict. If there is any other defect or omission in the pleadings and no demurrer is taken and issue is joined and the issue be such that proof must necessarily be had of the facts defectively stated or omitted, the defect is cured.

Opinion of Chief Justice Alvey, Rec. p. 86, citing 1 Wms. Saunders, 228.

Township of Lincoln *vs.* Cambria, 103 U. S. 412.

The declaration here charges that it was the duty of—

> "the engineer *and other employees* of the Baltimore and Potomac Railroad Company to so manage and conduct said train of steam cars as to avoid danger to passengers in the street car, but that the defendants and each of them, and their and each of their servants and employees in charge of said car and train conducted themselves so negligently and carelessly that as said street car approached said cross-

> ing the gatekeeper who was operating the gates or guards at said crossing which were erected for the purpose of preventing damage to vehicles and foot passengers negligently allowed the driver of said street car to drive the same partly beneath the said gates and partly over and across the tracks of the said The Baltimore and Potomac Railroad Company. . . . And the plaintiffs aver that the injuries occasioned to the female plaintiff were caused by the gross carelessness and neglect of said defendants and each of them, their and each of their servants and employes."

It will be seen that the employees of the steam railroad company were specifically charged with the duty of using proper care to guard the crossing; that the gatekeeper who was operating the automatic gates erected for the very purpose of guarding the crossing was negligent in this respect, and injury resulted, and that this injury was caused by the negligence of the servants and employees of the steam railroad.

This we confidently submit is the statement of a cause of action against the steam railroad company by reason of the gatekeeper's carelessness. And certainly upon the consideration of the motion in arrest of judgment where the court can only look at the pleadings, it would have been manifest error to have granted the motion. The declaration is unusually specific in averring facts which show that a high degree of care was necessary in approaching this dangerous crossing, and it further avers that the defendants were negligent with respect to a duty which the law imposed upon them to the damage of the plaintiffs.

Bank *vs.* Guttschlick, 14 Peters, 19.

If the defendants desired a greater degree of particularity in the averment of the specific act of negligence, they might have obtained it by a motion for a bill of particulars, or should have pointed out the supposed defect in the statement

by demurrer. The most that could be claimed is that the allegation in the declaration was the defective statement of a perfectly good cause of action, but as was pointed out in the opinion of Chief Justice Alvey, no such defect existed.

It was proved at the trial that the gatekeeper was employed by the Baltimore and Potomac Railroad Company (Rec. pp. 42, 45, 48), and it was held by the trial court and the ruling affirmed on appeal that it was substantially alleged in the declaration that the gatekeeper was an employee of one of the defendants, or both of them, and that it is competent to prove that he was the agent of one of the defendants. The declaration avers specifically that the gates were erected for the very purpose of preventing accidents like the one in question. The declaration further charges that it was the duty of the employees of the railroad company, other than its engineer, to see that its trains were so conducted and managed as to avoid injury to passers-by, and that a breach of this duty occurred. The gatekeeper was just as much engaged in this business as the engineer or conductor on the train. The defendants were advised by the declaration that the gatekeeper, whom they knew to be their servant, was negligent in his management of the gates, and so they were not surprised by the proof. It is contended by the Baltimore and Potomac Railroad Company that no duty is charged upon the gatekeeper by the averments of the declaration. This, we submit, is incorrect in fact; and if it were true, no such allegation is necessary. It is charged that the gates were erected for the purpose of preventing accident and collision, and that the gatekeeper negligently operated them. This is a sufficient allegation of a duty and its breach.

The declaration *must show facts* on which a duty is founded, which it is incumbent upon the defendant to perform with respect to the rights of the plaintiff, . . . and it is enough if there be certainty to a common intent.

Hines *vs.* Gas Co., 3 Appeals D. C. 369.

SECOND.

The next assignment of error relied upon in the court below was that the trial court erred in admitting evidence to show that the gatekeeper was a servant of the Baltimore and Potomac Railroad Company, because it is not in terms stated in the declaration that he was such servant. The plaintiffs in error cited no authority in the court below, and can cite none here, which warrant any such contention, and it is difficult to perceive upon what principle the plaintiff in error—the railroad company—can seek to justify so great strictness and particularity of detail in a pleading.

In the case last cited, it was contended that the declaration failed to charge any particular person with neglect. but Chief Justice Alvey held that the allegation that the defendant was guilty of negligence was well supported by proof that the negligence or wrong was committed by the servants or agents of the defendant in the course of their employment.

Hines *vs.* Gas Co., *supra.*

In Railroad Company *vs.* Horst, 93 U.S. 297, it was held that the allegation in the declaration that the injury was caused by "the carelessness, negligence, and improper conduct on the part of the defendant" was sufficient.

In actions for personal injuries resulting from negligence, it is sufficient for the plaintiff to allege the negligence of the defendant in general terms. He is not required to state the circumstances with which the infliction of the injuries was accompanied. An allegation of the extent of the injury and the manner in which it was inflicted has always been regarded as sufficient.

Chiles *vs.* Drake, 2 Metcalf (Ky.), 146, citing—
2 Chitty on Pleading, 652.

See, also—

Shearman & Redfield on Negl., Par. 13.
Railroad Co. *vs.* Case, 9 Bush, 728.

THIRD.

The next assignment of error relied upon in the court below was the failure of the trial court to direct a verdict in favor of the Baltimore and Potomac Railroad, because there was no sufficient evidence indicating negligence on the part of its servants. We assume that in an appellate tribunal, the court will not undertake to weigh the evidence, and that if, from the record, it appears that there was sufficient evidence of negligence to justify a submission of the question to the jury, and sufficient evidence to sustain the jury's finding, the verdict is conclusive of that question. It is perfectly plain from the evidence, all of which is incorporated into this record, that the gatekeeper lowered his gates before the street car reached the crossing, and that thereupon the street car stopped in a place of safety; that with the locomotive engine only fifty or sixty feet away and rapidly approaching, the gatekeeper raised his gates and invited the car driver to cross; that while the latter, in response to the invitation thus extended him, undertook this rash and criminally careless undertaking, the gatekeeper again lowered his gates, pinned the street car between its arms, and thus endangered the lives of scores of people. As was said by the learned justice who delivered the opinion of the Court of Appeals of the District of Columbia, this conduct was more than ordinary negligence; it was reckless indifference to the safety of human life (Rec., p. 88).

FOURTH.

It was next objected in the court below that there was a fatal variance between the declaration and the propositions embodied in the first and second prayers granted at the instance of the plaintiffs in that the court is asked to say that the plaintiff, Mrs. Hickey, was entitled to recover if the jury found that she *jumped* from the car under a well-founded apprehension of an impending collision, the declaration

charging that she was pushed from the car in the midst of the commotion created by the approach of the train of steam cars.

It is to be observed, in the first place, that there is no variance between the allegations of the declaration and the proof offered on behalf of the plaintiffs. Every witness who was examined on behalf of the plaintiffs, including Mrs. Hickey herself, who spoke on that subject, testified that she was pushed off the car, and the alleged variance was introduced into the case by proof offered by the defendants by way of defense.

No variance ought ever to be regarded as material where the allegation and the proof substantially correspond or where the variance was not of a character which could have misled the defendant at the trial.

Nash *vs.* Towne, 5 Wall. 689.

Ferguson *vs.* Harwood, 7 Cranch, 408.

No variance between the allegations in a pleading and the proof is material unless it has actually misled the adverse party to his prejudice.

Zennuger *vs.* Schnitzler, 48 Kan. 66.

In an action against a city to recover injuries caused by a fall the declaration alleged that the injury was received "just as the plaintiff was about to step on the sidewalk," while the proof showed that she received the injuries *after* she got upon the walk. *Held*, that the variance was immaterial.

City of Rockford *vs.* Hollenbeck, 34 Ill. App. 40.

In an action against a railroad company for injuries alleged to have been sustained at Provencal, La., proof that the accident occurred at Robeline, La., does not constitute a material variance.

Brown *vs.* Sullivan, 71 Tex. 470.

Variance between the description of property in the summons, the writ and the inquisition, where it created no uncertainty, was held not to be fatal.

Ewing *vs.* Houston, 4 Dall. 67.

The declaration alleged that the cause of the injury was the defective condition of a bridge, in that the planks were loose and the stringers uneven, whereby the planks were liable to slip off, turn over and tip up, and thereby trip horses, and that plaintiff's horse became entangled in the loose planks and thereby tripped. The proof showed that there was a broken plank and a hole in consequence thereof into which the horse stepped and then stumbled, causing the wagon to fall. *Held*, no variance.

Mukle *vs.* Bennington, 68 Mich. 133.

In Davis *vs.* Guilford, 55 Conn. 351, it was held that no variance was material where no doubt was raised in the mind of the defendant as to the charge which he was required to meet, or where he was not thereby induced to omit any matter of defense.

The declaration alleged that the plaintiff was injured by being "thrown from a car." The proof showed that to save himself from apparent danger "he jumped from the car." *Held*, no material variance.

Railway Co. *vs.* Johnson, 83 Texas, 628.

No authority was cited in the court below and we submit that none can be cited here to sustain this contention of the plaintiffs in error. The substantial and primary cause of the injury was the panic and commotion created in the car by the criminal carelessness of the gatekeeper and the street car driver. The variation of detail was introduced into the case by the defendants themselves, as new matter, by way of defense, and the plaintiffs had a right to the instruction of the court upon the case made by the defendants. The plea filed by both defendants was the general issue "not

guilty," and the plaintiffs were surprised, if any one was, by the introduction of this proof. Having created the alleged variance, the defendants had no right to complain of it. If the defense that Mrs. Hickey jumped from the car had been specially pleaded, or if any notice had been given to the plaintiffs that such proof was to be offered at the trial, the plaintiffs either by way of reply or by way of amendment or by demurrer could have so framed the pleadings as to have justified a recovery on the theory that Mrs. Hickey jumped from the car in an effort to avoid the consequences of a collision.

FIFTH.

It was next urged that there was no sufficient proof that the gatekeeper was an employee of the Baltimore and Potomac Railroad Company. Upon this proposition we invite the attention of the court to the testimony of Stevens (Rec., p. 42). He says that he was at one time general agent of the Baltimore and Potomac Railroad; that the company laid and operated the track and still has the management and control of the track. McKeever says, (Rec. p. —):

> "On June 12, 1886, I became trainmaster of the Baltimore and Potomac Railroad Company and so remained for four years (that is, to June 12, 1890, and the accident happened in 1889). During that time the Baltimore and Potomac Railroad Company operated the track."

McKeever also says (Rec., p. 46), that during those years from 1886 to 1890, the gatekeeper at the crossing in question was a subordinate of the supervisor of tracks of the Baltimore and Potomac Railroad Company. He also testifies that other railroad companies used the tracks, but that those railroads were managed by officials of the Baltimore and Potomac Railroad Company.

Mr. Tiers (Rec., p. 48), the man who employed the gatekeeper, or in whose employ the gatekeeper was, testifies that

he was the assistant supervisor of the Baltimore and Potomac Railroad Company. This witness was called by the railroad company, and the company also called as a witness the gatekeeper himself, who testified that it was his business to watch the approach of trains, and counsel for the railroad company failed to ask him by whom he was employed and failed to negative in any way whatever the testimony offered by the plaintiffs in the trial court upon this subject. This we respectfully submit is conclusive as against this objection.

SIXTH.

It is next contended that the trial court erred in instructing the jury that they might find against the defendant by reason of the negligence of the engineer in the running of his train. This is at best but a verbal criticism of the plaintiffs' first and second prayers. At the trial the plaintiffs contended that the train was being run at an unlawful and negligent rate of speed, and we submit that the evidence upon this point was ample. There was evidence, and a great deal of it, to the effect that this train was running at an unlawful and dangerous rate of speed, to wit, 15 miles an hour, when the ordinance limited the speed to 6 miles an hour, and while the court permitted evidence as to the rapid speed of the train to be introduced for the purpose of enlightening the jury upon the question of the reasonableness of the apprehension on the part of the passengers in the street car, the court expressly charged the jury (Rec. p. 77), that they could only find against the Baltimore and Potomac Railroad Company in the event that they found the gatekeeper to have been negligent. On page 76 the court repeats the language of prayer No. 1, asked by the Baltimore and Potomac Railroad Company, that—

> "under the pleadings in this cause, the plaintiffs are not entitled to recover for any negligence, if any, on the part of the employees of the defendant, the Baltimore and Potomac Railroad Company, in respect of

the rate of speed of its steam train approaching Seventh street from the west at or about the time of the accident to the female plaintiff."

And again (Rec., p. 72,) the court warns the jury that the only reason why evidence of the speed of the train was admitted was to explain and justify the commotion in the street car and to enable them to determine whether the commotion was natural and reasonable in the situation that confronted the passengers. If there were any verbal defects in the prayers requested by the plaintiffs, they were, as Chief Justice Alvey in his opinion (Rec., p. 89,) states, removed by the court in its oral charge to the jury.

But we contend that the declaration charged negligence in the running of the steam train, and that proof of rapid running was therefore admissible in support of this charge, and it was competent to prove the ordinance and the violation of the ordinance.

The running of a railroad train within the city limits at a greater speed than is permitted by the city ordinances is a circumstance from which negligence may be inferred.

RR. Co. *vs.* Ives, 144 U. S. 408.

And the ordinance may be proved even though the resistance of the ordinance is not alleged in the declaration.

Faber *vs.* RR. Co., 8 Am. & Eng. RR. Cases (Mich.). 277.

We submit, therefore, upon this branch of the case, that the trial court was too strict in the matter of proof of fast running of the steam railroad train and the legal effect of such proof, as against the plaintiffs, and if error was committed at all in this regard, it was to the prejudice of the plaintiffs at the trial, of which the plaintiffs in error here cannot complain.

SEVENTH.

The only other assignments of error relied upon by the Baltimore and Potomac Railroad Company in the Court of Appeals of the District related to certain instructions of the trial justice defining the duties of the gatekeeper and the driver of the street car separately, and with relation to each other. As was said in the opinion of the court below, (Rec. p. 89) much confusion was introduced into the case by reason of the separate and adversary instructions sought by the defendants as between themselves—the defendants mutually attempting to place the exclusive blame or liability for the accident, the one upon the other, but we confidently submit that no error can be found in the rulings of the trial court upon these prayers. Any possible inaccuracy in the language of the written prayers requested by the plaintiffs was corrected by the very full and accurate charge of the court to the jury which covered every branch of the case, and in which we submit no substantial error can be found.

III.

What has already been said in reply to the propositions urged on behalf of the Baltimore and Potomac Railroad Company will apply also to the Washington and Georgetown Railroad Company, whose counsel in the Court of Appeals of the District relied upon only two objections other than those which have already been discussed.

FIRST.

It was urged that the trial court erred in not instructing the jury that if the commotion in the street car was caused by the sudden lowering of the gates and that the driver of the street car did not know and had no reason to believe that the gates would be lowered, the verdict should be in favor of the street car company. This was practically an instruction to the effect that there was no sufficient evidence of negligence on the part of the driver of the street car.

No sort of justification existed for such an instruction. It was claimed that the alleged negligence of the driver of the street car was not the proximate cause of the injury, and that the street car would have passed the steam railroad track in safety had it not been for the subsequent careless act of the gatekeeper.

In discussing this proposition we submit that counsel have misconceived the evidence and the instructions of the court. It is undoubtedly the law that each one of the defendants was responsible only for the negligence of its own employees, and the court below so told the jury (Rec., pp. 70 and 71), and it is equally true that no matter how careless the street car driver may have been his employer would not be responsible for any injury that was not the proximate result of that carelessnes or that was not in part due to it, and the court so distinctly charged the jury. On page 77 of the Record the court says:

> "It is claimed by counsel for the Washington and Georgetown Railroad Company that there was ample time for its cars to pass over the track of the Baltimore and Potomac Railroad Company before the train of the latter would reach the point of intersection of the two tracks, and that as the car of the former company approached the tracks of the latter the gates were up, and that the horses drawing the street car had reached the steam car track when the gatekeeper suddenly lowered his gates and thereby produced the confusion. . . . *If you find that the evidence establishes these facts as thus claimed by the Washington and Georgetown Railroad Company, it would be entitled to your verdict in its favor.*"

And again on page 79 the court tells the jury:

> "But you will remember that the negligence for which you should hold the defendants or either of them responsible must have been negligence which contributed directly to cause the injury. . . . The law will not permit the plaintiff to recover if the

injury complained of was not the result of the negligence of the defendant."

This, we submit, is an accurate statement of the law.

A passenger injured by a collision resulting from the concurrent negligence of two railroad companies may maintain a joint action against both.

Shearman & Redfield on Negl., Par. 58.
Colegrove *vs.* RR. Co., 20 N. Y. 492.

If the defendant's negligence concurred with some other event (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time. . . . The practical construction of "proximate cause" by the courts is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue.

Shearman & Redfield on Negl., Par. 10.
Law Rep. 5 Exch. 204.
Powell *vs.* Deveney, 3 Cush. 300.
Peck *vs.* Neal, 3 McLean, 22.
Lockhart *vs.* Lichtenthaler, 46 Pa. St. 151.

If the concurrent or successive negligence of two persons combined together results in an injury to a third person, he may recover damages of either or both.

Thompson on Negl., page 1088.
Eaton *vs.* RR. Co., 11 Allen, 500.
Barrett *vs.* RR. Co., 45 N. Y. 628.
Ricker *vs.* Freeman, 50 N. H. 420.

The driver of a street car was warned as he approached Maryland avenue that a train of steam cars was approach-

ing from the west. He knew this because the gates had been lowered and because his line of vision towards Ninth street was unobstructed. The evidence showed that he was in a hurry, and that he undertoook to drive his horses across the steam railroad tracks without looking to the right or to the left, when, as the evidence disclosed, the rapidly approaching engine was only forty or sixty feet away at the moment when the car got upon the steam railroad tracks. This was, we submit, evidence of negligence which should have been submitted to the jury. It was the act of the driver which placed the passengers in the street car in a position of peril, and his act was just as responsible and contributed as directly to the injury as did that of the gate keeper.

IV.

It is claimed that the jury were instructed that if they found for the plaintiffs they might find for any amount they pleased within the limit of the sum claimed in the declaration. It should be observed in the first place that no exception was taken to the language of the court in this respect. On page 80 of the record the court says to the jury:

> "Your verdict, if you find for the plaintiffs, must be fixed by you in the exercise of a sound discretion, subject, of course, to the limits placed in the declaration of thirty thousand dollars."

No exception whatever was taken to this language by either defendant, and we submit advantage cannot be taken of it now.

In the next place the court, in granting the plaintiffs' fourth prayer, said to the jury:

> "If the jury find from the evidence that the plaintiffs are entitled to recover, then they shall award such damages within the limits of the sum claimed in the declaration *as will fairly and reasonably*

> *compensate* the plaintiff Margaret for the pain and suffering caused to her by the injury which she sustained and for the injury to her bodily health and power of locomotion, if any such they find, which she has sustained in the past and will continue to sustain in the future as a natural consequence of said injury, and for such internal injuries and impairment to her physical health as they may find to be established by the evidence."

How this language can be tortured into meaning that the jury was governed by no limit except the exercise of their own pleasure and the sum claimed in the declaration is difficult to imagine. The jury were told that the verdict must represent only fair and reasonable compensation within the limits of the sum claimed. Would it have been proper for the court to say that thirty thousand dollars was an amount larger than ought to be awarded to the plaintiffs?

There were only three cases cited in the brief of the Washington and Georgetown Railroad Company in support of this contention, none of which sustain it. In the case in 27 Ga. 87, the trial judge told the jury that in an action claiming exemplary damages the only limitation upon the amount of the verdict was the sum claimed in the declaration. The very meager opinion filed in this case simply states that the naked instruction that the only measure of damages was the unguided discretion of the jury within the limits of the sum claimed in the declaration was calculated to mislead the jury. This we may very well concede for the purposes of the argument, but it is not what the court did in the present case.

In the case in 57 Tex. 215, the court stated where the jury was properly instructed otherwise upon the measure of damages it would not be error for the court to tell the jury that their verdict should not exceed the amount claimed. In that case all that the trial court said on the measure of damages was that "as to the amount of the recovery the law leaves the question to the jury alone, restricting them only

by confining them within the limits of the damages laid in the petition," and the court refused several prayers asked by the defendant as to the measure of damages which the appellate court held were proper, and the court said:

> "The rules should be deduced by the judge below from the allegations and evidence in the particular case. Instead of doing this the judge below assumed, not from the evidence, but from the pleadings, that the measure of damages was limited only by the gross amount contained in the petition. . . . The charge in the case not only failed to instruct the jury as to the legal measure of damages, but gave them an improper instruction on this point, which would have been to some extent corrected by the instructions asked and refused."

In the case of Willis *vs.* McNeill, 57 Tex. 465, the jury were told that they were authorized to go to the limits claimed in the declaration (which was not done in the present case), and the court in that case further stated that it was usual for the court to read the declaration to the jury.

It is too well settled to need the citation of authority that a plaintiff cannot recover a larger sum than is claimed in his declaration.

He is no more entitled to recover without proper averment of the amount than he would be without proof of such averment if properly made.

Enoch *vs.* Mining Company, 23 W. Va. 314.

"And, with proper limitations and proper instructions, the jury ought to be told that the plaintiff is not entitled to recover more than he claims. Under the practice in the Supreme Court of the District the jury always take with them the declaration which specifies the amount claimed, and, with that paper in their possession and with proper instructions as to the measure of damages, it is clearly not error to tell them that they cannot give the plaintiff more than he claims, but must bring their verdict within the limits of the sum specified in the declaration.

In Klutts *vs.* RR. Co., 9 Am. & Eng. RR. Cases, 640, the court below instructed the jury that if they should find for the plaintiff they should assess his damages at such sum as they should think he was entitled to, not to exceed $10,000.

On appeal this instruction was sustained and the judgment below affirmed, and so in Railroad Co. *vs.* Dunlavy, 9 Am. & Eng. RR. Cases, 675, the trial court instructed the jury that "they should find for the plaintiffs such damages as they had actually sustained and such other damages as the jury believed from the evidence the plaintiffs were entitled to, not exceeding the amount claimed." This specific instruction was sustained, although the case was reversed on other grounds.

V.

The last proposition urged by the Washington and Georgetown Railroad Company upon the question of variance has already been discussed in reply to the brief of the Baltimore and Potomac Railroad Company, and need not be considered further.

It appears from the record that the trial below lasted from April 20 to May 1, 1894, and consumed a great deal of time. A very large number of witnesses were examined, and numerous exceptions were noted by both defendants, but in the whole record we believe that no substantial error can be found, and that if any error were committed by the learned justice below during the trial it was corrected by the very full, accurate and carefully prepared charge which he gave to the jury, and which we submit states the law as accurately and as favorably to the defendants as they had a right to expect.

We submit that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

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